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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

DAVID H. ROGERS,
Appellant,

v.

THE STATE OF NORTH CAROLINA,
Appellee.

On Appeal From The
Supreme Court of North Carolina

JURISDICTIONAL STATEMENT

WAYNE EADS
The Nash Square Bldg.
227 W. Martin St.
Raleigh, N.C. 27601

Attorney for Appellant

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QUESTIONS PRESENTED

1. Did the failure of the State to comply with the discovery and disclosure requirements of G.S. 15A-901, et seq., violate the Due Process Clause of the Fourteenth Amendment as interpreted in, inter alia, Brady v. Maryland, 373 U.S. 83 (1963)?

2. Did the prosecution of this case violate the Due Process Clause of the Fourteenth Amendment as it prohibits vindictive prosecutions, as interpreted in North Carolina v. Pearce, 395 U.S. 711 (1969), Blackledge v. Perry, 417 U.S. 21 (1974), and Thigpen v. Roberts, 468 U.S. ___ (1984)?

3. Did the prosecution of this case violate the Due Process Clause of the Fourteenth Amendment as it prohibits selective and discriminatory enforcement of laws, as interpreted in Yick Wo v. Hopkins, 118 U.S. 356 (1886) and Oyler v. Boles, 368 U.S. 448 (1962), and as will be interpreted in United States v. Wayte, which was

reported below at 710 F.2d 1385 (9th Cir. 1983)?

4. Did the trial court lack jurisdiction over the subject matter of this case because of the failure of the State to follow the requirements of the "presentment statutes," G.S. 7A-271, 7A-272, 15A-628, and 15A-641, read in pari materia, thereby violating the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment?

5. Are the "presentment statutes," G.S. 7A-271, 7A-272, 15A-628, and 15A-641, read in pari materia, unconstitutional as applied to this case because they violate the prohibitions of the void-for-vagueness doctrine of the Due Process Clause of the Fourteenth Amendment?

6. Are the provisions of G.S. 84-36 unconstitutional as applied to this case because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, and the proscription

against cruel and unusual punishment of the Eighth Amendment?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption of this jurisdictional statement.

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Appendix A, Order of N.C. Supreme Court Denying Petition For Certiorari and Request for Temporary Stay

Appendix B, Opinion of N.C. Court of Appeals affirming convictions below.

Appendix C, Notice of Appeal filed with the N.C. Supreme Court giving notice of appeal to the U.S. Supreme Court.

OPINION BELOW

The Order of the North Carolina Supreme Court denying the Petition for Writ of Certiorari to Review the Decision of The North Carolina Court of Appeals and the Request for Temporary Stay, dated and docketed August 9, 1984, has not yet been officially reported. For a copy of said order, see Appendix A infra.

The Decision of the North Carolina Court of Appeals, from which review was sought by Petition for Writ of Certiorari, has been officially reported at 68 N.C. App. 358 (1984). See Appendix B infra.

JURISDICTION

Jurisdiction of this Supreme Court is confered by the provisions of 28 U.S.C. 1257(2). A notice of appeal to this Court was filed with the Clerk of the North Carolina Supreme Court on October 4, 1984. See Appendix C infra. The opinion of the N.C. Court of Appeals is a final order reviewable by this Supreme Court within the meaning of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), Richmond, F., & P. R. Co. v. Louisa R. Co., 54 U.S. 71 (1852), Williams v. Bruffy, 102 U.S. 248

(1880), Gallick v. Baltimore & Ohio R. Co. 372 U.S. 108 (1963), and Harrison v. Missouri P. R. Co., 372 U.S. 248 (1963). The North Carolina Supreme Court refused to review the decision of the North Carolina Court of Appeals, thereby rendering such opinion final for purposes of appellate jurisdiction herein. See Appendix B infra. The decisions of the N.C. Court of Appeals, as in the trial court, were in favor of the constitutionality of the statutes or applications of statutes in this case, and against the defendant.

ALTERNATIVE JURISDICTION

In the alternative, should this Supreme Court decide that jurisdiction does not lie under 28 U.S.C. 1257(2), then the Appellant requests that this Supreme Court consider these documents as a timely Petition for Writ of Certiorari pursuant to 28 U.S.C. 1257(3), and decide all issues raised herein pursuant to that statute and the authority of Cox v. Cohn, supra, and New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment XIV, Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.C. General Statutes.

G.S. 7A-271(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:

. . .

(2) When the charge is initiated by presentment . . .

(c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court division any pending misdemeanor which does not fall with the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court."

G.S. 7A-272(a) provides:

> Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

G.S. 15A-628(a)(4) provides that the grand jury:

> may investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more criminal offenses if it has found probable cause for the charges made. An investigation may be initiated upon the concurrence of twelve members of the grand jury itself or upon the request of the presiding judge or convening judge or prosecutor.

G.S. 15A-641(c) defines "presentment":

> A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned

in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

G.S. 84-36 provides, in pertinent part, that nothing contained in Chapter 84:

> shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.

G.S. 15A-901, et seq., provide in pertinent part:

> 15A-903(a) Disclosure of evidence by the State - Information Subject to disclosure.
>
> Statement of the Defendant. Upon motion of a defendant, the court must order the prosecutor:
>
> (1) To permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the State the existence of which is known or by the exercise of due diligence may become known to the prosecutor; and
>
> (2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant . . .

(d) Documents and Tangible Objects. Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings . . . within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at trial, or were obtained from or belong to the defendant.

(4) If the State elects not to comply with an order of the court under subdivision (2) or (3) to deliver a statement to the defendant, the court shall strike from the record the testimony of the witness, and direct the jury to disregard the testimony, and the trial shall proceed unless the court determines that the interests of justice require that a mistrial be declared.

(5) The term "statement" as used in subdivision (2), (3), and (4) in relation to any witness called by the State means:

(a) A written statement . . . ;

(b) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital, or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements.

CITATIONS OF AUTHORITIES

Statutes:

28 U.S.C. 1257(2) ---------- v, vi

28 U.S.C. 1257(3) ---------- vi

G.S. 7A-271 ---------- vii

G.S. 7A-272 ---------- viii

G.S. 15A-628 ---------- viii, 21

G.S. 15A-641 ---------- viii, 21,23

G.S. 15A-901, et seq.-- viii, 8, 9, 12

G.S. 84-1, et seq. ------ viii, 26, 29

Constitutional Amendments:

Amendment XIV, Clause 1 ----- vii

Cases:

Blackledge v. Perry, 417 U.S. 21 (1974) ----- 15

Brady v. Maryland, 373 U.S. 83 (1963) --------- 9, 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ---------- iv, v

Herndon v. Lowery, 301 U.S. 242 ---------- 24

In re Burton, 257 N.C. 534 (1962) ---------- 27

Lanzetta v. New Jersey, 306 U.S. 451 ---------- 24

McMichael v. Proctor, 243 N.C. 479 (1957) ---- 28

New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928) --------- v

North Carolina v. Pearce, 395 U.S. 711 (1969) ---- 15

Oyler v. Boles, 368 U.S. 448 (1962) ---------- 18

Screws v. United States, 325 U.S. 91 (1945) ----- 24

State v. Barnes, 253 N.C. 711 (1961) ---------- 14

State v. Cole, 294 N.C. 304 (1978) ---------- 20

State v. Thomas, 236 N.C. 454 (1952) -------- 20

Thigpen v. Roberts, 468 U.S. ___ (1984) -------- 15

United States v. Bufalino, 576 F.2d 446 (2d Cir. 1978) --------- 13

United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974) -------- 16,18

United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983) ---------- 19

Winters v. New York, 333 U.S. 507 (1948) --- 24

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ------- 18

STATEMENT OF THE CASE

This case arose out of a presentment followed by an indictment handed down by the Wake County grand jury on October 25, 1982. The indictment charged three criminal offenses: (1) standing bond for a non-family member; (2) improper in-person solicitation of legal business by an attorney; and (3) intimidation or interference with a State's witness in a named case. The defendant retained the undersigned counsel to represent him, and then filed various pretrial motions, including motions to raise each of the six questions presented herein for review. In addition, counsel made a pretrial motion to dismiss the third count for failure to state an offense under North Carolina law. This latter motion was granted by the trial court on February 14, 1983.

Thereafter, on February 15, 1983, the State returned to the Grand Jury and obtained a superseding indictment which charged the defendant with four offenses: (1) standing bond for a non-family member; (2) improper solicitation of legal business by an attorney; (3) intimidation

of a State's witness; and (4) attempting to interfere with a State's witness. Both counts 3 and 4, as well as count 3 of the original indictment, all referred to the same witness in the same case, and to the same single conversation, which was alleged as a basis for count 3 of the original indictment and counts 3 and 4 of the superseding indictment. All four charges, like the original three charges in the original indictment, were misdemeanors. The State subsequently took a dismissal in open court of the original indictment, and proceeded to trial on the superseding indictment.

All pretrial motions relating to the six constitutional challenges set forth for review herein were denied, and all objections related thereto during the course of the trial were likewise ruled against the defendant. Exceptions were noted as required, and the issues fully preserved for appeal. The trial itself commenced on February 22, 1983, and was completed on February 28, 1983.

The State, as well as the defendant, presented various witnesses

and various written exhibits. The State elicited evidence tending to show that the defendant met an individual named Paula Anne Gately during the early morning hours of July 7, 1982 in the office of the Wake County Magistrate, and signed for her a surety bond in the amount of $100.00, thereby securing her release from jail on a charge of driving under the influence and a second charge of hit and run driving. Evidence for the State further showed that at the time of this act of the defendant, he did not know Paula Anne Gately, did not represent her, was not related to her, and personally signed the surety forms himself.

Evidence for the State also tended to show that Jerry P. Ray was the magistrate on duty at the time, and that he attempted to inform the defendant of the existence of a statute prohibiting attorneys bonding out certain people, but the evidence conflicted on whether he specifically told the defendant that the statute prohibited attorneys bonding out non-family members or whether he simply told the defendant the statute prohibited attorneys from bonding out their clients. The evidence was

clear, however, that the magistrate made some reference to the existence of such a statute, and gave the defendant an opportunity to read it for himself in the law books available in the magistrate's office but the defendant declined to do so.

Further evidence for the State tended to show that, at some point after he stood bond for Paula Anne Gately, the defendant undertook to represent her on those charges, and to that end made a court appearance on her behalf on August 19, 1982. The State's evidence also showed that, at some point in time prior to August 19, the defendant was repaid his bond money by Ms. Gately. The State's evidence also showed that, sometime during the morning of August 19, 1982, the defendant attorney had a conversation with Gately, the arresting officer, and a witness named Bobby Edward McMillian. The evidence for the State tended to show that, during that conversation, the defendant made remarks which the jury in the defendant's own case, here on appeal, used as a basis for finding him guilty of attempting to interfere with a State's witness by inducing him to leave

the courtroom prior to the Gately case being called for trial by the prosecutor. However, the evidence for the State clearly showed that, at the time later that morning when the prosecutor actually did in fact call the case for trial, the witness had returned to the courtroom and was actually standing in the courtroom at the time the prosecutor moved the court for a continuance based on the unavailability at that time of her key witness, Bobby E. McMillian.

The defendant called witnesses to testify in his behalf and then took the witness stand himself. He admitted he signed the surety forms to bond out Ms. Gately, and that at the time he did so, he did not represent her and was unrelated to her. He explained his actions by stating that the magistrate had told him very clearly that an attorney cannot stand the bond of a client, and pointed as he said so to an open statute book, which the defendant declined to read, stating that he did not represent Ms. Gately. The magistrate had then permitted him to sign the bond forms and had released Ms. Gately.

The defendant's evidence further showed he had only one prior experience with bonds of any sort, that being with a bond in a civil case, in which he had inquired in open court of the presiding judge and had been allowed to post that bond for his client. The defendant's testimony conflicted sharply with the State's evidence as to whether or not he had attempted to interfere with Bobby McMillian and induce him to leave the courtroom so as to be unavailable when the prosecutor called the Gately case for trial; the defendant's testimony was to the effect that he had, in his mind, negotiated a settlement of both the civil property damage claim and the criminal charges, in a meeting attended by the arresting officer, the defendant Gately, and the victim therein of the hit and run, Mr. McMillian. He admitted to having used poor judgment in not having asked the prosecutor to sit in and participate in that negotiation, but stated that he had never at any time intended to deceive the prosecutor or withhold the results of that meeting.

At the end of all the evidence, in-

cluding rebuttal evidence from another officer disclosing alleged admissions of the defendant made during an interview with such officer, the case was sent to the jury for deliberations. The verdict was as follows: Count I (being a surety for a non-family member), guilty; Count II (improper in-person solicitation of legal business by an attorney), not-guilty; Count III (intimidation of a State's witness), not-guilty; and Count IV (attempting to interfere with a State's witness), guilty. The trial judge had submitted all four counts of the superseding indictment, over the defendant's strenuous objections, with a separate verdict to be entered for each count.

The defendant stood and was pronounced guilty of Counts I and IV, both misdemeanors, and sentencing was scheduled for March 7, 1983. The defendant was given a suspended sentence on each count, run consecutively, and was placed on unsupervised probation on condition he abide by the usual terms and conditions of probation and several special conditions. These included surrendering his law license and giving up

his law practice for a term not to exceed eighteen months. This suspension from the practice of law was included both as part of the judgment suspending sentence in the criminal case, and as a separate, "civil" order imposing discipline on an attorney for misconduct relating to his practice of law. From these verdicts and judgments, the defendant appealed, and the case was duly docketed and briefed in the N.C. Court of Appeals. From the decision of that court affirming the judgments below, the defendant sought review by certiorari from the N.C. Supreme Court, which request was denied by Order dated August 9, 1984.

THE FEDERAL QUESTIONS PRESENTED HEREIN ARE SUBSTANTIAL, AND DESERVE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS, AND ORAL ARGUMENT, FOR THEIR RESOLUTION.

POINT I

Relating to the first question presented, the North Carolina General Statutes (G.S.) mandate, at G.S. 15A-901, et seq., that the State disclose on discovery any tape recordings of interviews or statements made by the defendant to investigat-

ing law enforcement officers. Such a recording of the defendant was made in this case, and specific and timely demand for same was made by the defendant pursuant to the provisions of G.S. 15A-901, et seq., and the doctrines of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. In response to that demand, and continuing demands for same during the course of the trial, the State provided the defendant what was purportedly a transcript made of that tape recording. The defendant contested that transcript at every appropriate stage of the pretrial and trial proceedings as being highly inaccurate and extremely prejudicial to the defendant. On a hearing to show cause why the tape recording should not be produced for the examination, testing, and transcription of the defendant, the State admitted that the tape recording had been destroyed by law enforcement personnel after the transcription had been typed. There was no denial that such a tape recording had once existed, and that it had continuously been retained in the possession of the investigating officers from the time it

was recorded until sometime after the transcript was typed, and that it had thereafter been destroyed or rendered unusable by law enforcement personnel. The excuse offered for that destruction was that the tape itself was reused by law enforcement personnel for other purposes, despite their admitted knowledge that a trial involving the subject matter of that tape recording was pending against the member of the Bar of the North Carolina Supreme Court. This reusing of the tape, it was alleged, was done in the "routine course of business," and was consistent with their "routine practice and procedures."

The importance of that tape ultimately was twofold: (1) the court stated its only reason for not granting a pretrial motion to dismiss for lack of any evidence other than hearsay being presented to the indicting grand jury was the alleged admissions of the defendant contained in the statement being challenged, and (2) the State offered rebuttal testimony in which a police detective testified that the defendant had admitted to him in that statement that he had attempted to interfere with the witness McMillian, thus permitting

the State to offer proof of the ultimate facts in issue while taking advantage of their wrongdoing in destroying that tape and not presenting it to the defendant as required by statute and caselaw. The defendant was unable to prove that the tape was consistent with his testimony and inconsistent with the detective's testimony, and could not disprove his alleged admissions. Furthermore, the importance of the tape is burned into the record by the trial judge's response to the defendant's motion to dismiss at the close of all evidence:

> Now taking that to be Mundy's (the policeman) testimony, what the defendant told him, and not just impeachment, it's substantive evidence, because it's [an] admission of a party; isn't that sufficient to carry it to the jury . . .

Moreover, the Court stated, in the same response to the motion to dismiss as to counts III and IV for insufficient evidence:

> Up to that point it was very shaky and I was prepared to dismiss the count[s] at the close of all the evidence until it got to that point, so . . .

The importance of the quoted portions of the trial transcript are that, as to the

two counts related to intimidation or interference with a witness, the court would have dismissed those counts had the tape recording been disclosed to the defendant as required by G.S. 15A-901 et seq., and Brady v. Maryland, supra. The State, having admitted that it destroyed a tape, and not denying that it knew of the mandate of the statute and the Brady case and its progeny, was nevertheless permitted to take advantage of its own behavior, violating the defendant's due process guarantees, and using its behavior to the ultimate prejudice of the defendant. Surely this issue raises a substantial question of federal law applicable to the nation as well as to this Appellant, and should be considered by this Court.

The Second Circuit Court of Appeals has stated this issue in a conceptual framework which demands a nationwide application:

> . . . we will look with an exceedingly jaundiced eye upon future efforts to justify non-production of . . . [discovery materials] by reference to 'departmental policy' or 'established practice' or anything of the like. There is simply

> no longer any excuse for official ignorance regarding the mandate of the law. Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrators motivation, unless the government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant.

United States v. Bufalino, 576 F.2d 446 (2d Cir. 1978).

POINT II

The trial court itself acknowledged that it saw a problem with increasing the number of charges from three to four and the potential punishment facing the defendant, but nevertheless allowed the State to proceed to trial upon the superseding indictment. The action taken by the trial court to cure that problem effected a cure to any double jeopardy considerations that might later arise, but failed to make any substantive inroads into the problem of the appearance of vindictiveness in the prosecution on the superseding indictment.

The N.C. courts failed in their opinions in this case to grasp the root of vindictive prosecution, and instead chose to rely upon cases involving the conceded

ability of prosecutors to obtain a more perfect indictment after arresting a defendant on what was perceived by the prosecutor to be an inadequate indictment, but before the defendant exercised any constitutional rights or statutory rights from which the prosecutor's subsequent action could be seen as a vindictive response thereto. State v. Barnes, 253 N.C. 711 (1961) Unfortunately, however, that was not the question.

The question raised by the defendant herein concerned the appearance of vindictiveness occasioned by the prosecutor obtaining a four-count indictment against him after the third count of the original indictment was dismissed upon pretrial motion of the defendant. The prosecutor explained his actions by stating that the third count of the original indictment, which was dismissed, was then reworded to constitute counts three and four of the superseding indictment, and the effect was to increase the number of charges from three (or two, if you consider that the trial court had just the day before dismissed count three) to four,

with a corresponding increase of two years in the potential punishment faced by the defendant.

Such actions are not permitted under the doctrines long established by this Supreme Court in North Carolina v. Pearce, 395 U.S. 711 (1969), Blackledge v. Perry, 417 U.S. 21 (1974), and last term's vindictive/selective prosecution case of Thigpen v. Roberts, 468 U.S. ___ (1984). Due process is violated by actions of the prosecution which bring into question in the minds of impartial observers of the judicial system the fairness of the proceedings being observed, and where the appearance of vindictiveness is strong, no actual malice or prosecutorial improper motive need be established in order to have the cases dismissed. Once that presumption has been raised, it is incumbent on the State to justify its actions or suffer the defendant's remedy of dismissal. Thigpen, supra. The defendant's exercise of his statutory and constitutional rights resulted in his trial on a four-count indictment instead of the original two-count indictment remaining after

the defendant's exercise of those rights. No justification was made by the State to rebut the Blackledge presumption (see fn. 6, Thigpen, supra), nor did any exist.

POINT III

In keeping with this outline tracking the six constitutional issues presented herein in order, the next substantial federal question raised is that of the quantum of proof required of a defendant in order to raise the question of selective prosecution sufficiently to obtain a full evidentiary hearing on that defense.

Generally, a defendant is entitled to a full evidentiary hearing on his pretrial defense of selective prosecution "when enough facts are alleged to take the question past the frivolous stage." United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974). In his attempt to meet that burden and obtain a full hearing on such defense, the defendant introduced a proffer of proof consisting of more than one hundred pages of documents and statements of witnesses to be called at such hearing. The defendant set forth therein five classes of persons of which he was the only one

ever prosecuted by the State of North Carolina. Defendant attempted therein to show that, because of his handling of various cases in which his clients sued the State of North Carolina and its various law enforcement agencies for alleged misconduct and violations of constitutional and civil rights, he was identified by agents of the State and marked for prosecution. Furthermore, he was subjected to hostile treatment in the courts by the various prosecutors and attorneys representing the law enforcement agencies sued, and this hostile treatment led to violent arguments with at least two specifically identified prosecutors in his home county of Wake, the same county in which the prosecutions herein were conducted. Without attempting to summarize his proffer herein, defendant contended at the time of the hearing of his pretrial motion on selective prosecution, that he had more than met his burden of "non-frivolousness" by presenting a prima facie case in order to receive a full evidentiary hearing. His motion was denied, and his evidentiary hearing was denied, and defendant was not

able to go further in attempting to prove his defense of selective prosecution. The effect of the trial court's ruling, which was affirmed by the N. C. Court of Appeals and the N. C. Supreme Court, was to hold the defendant, at the pretrial stage, to a final standard of proof on the defense of selective enforcement without being permitted to conduct an evidentiary hearing at which to subpoena law enforcement and prosecutorial witnesses and to otherwise develop and establish the evidence needed for full proof of the defense otherwise properly raised and preserved for appeal. Such an impossible burden renders the defense of selective prosecution merely theoretical in North Carolina, and such result is contrary to the rulings of this Supreme Court and all Circuit Courts of Appeal who have examined the question. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Oyler v. Boles, 368 U.S. 448 (1962); United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974).

Additionally, although this question raises in the context of this case an important federal question of national significance, this very issue is before this Supreme Court at its October, 1984 term in the form of the case entitled United States v. Wayte,

reported below at 710 F.2d 1385 (9th Cir. 1983). In light of the time restraints involved, it would be improbable that the same question in this case could be joined for review with the identical question in the Wayte case, but the decision in the Wayte case may well be dispositive of this issue in the instant case before the instant case makes its way through the channels to oral argument, but nevertheless, jurisdiction based on this question is submitted for purposes of the instant appeal.

POINT IV

The interpretation and application by the State of the four presentment statutes cited hereinabove resulted in an eventual outcome which was patently repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Defendant was convicted in a court which lacked jurisdiction over the subject matter of the trial, despite his having raised such contention at every appropriate trial, appeal, and petition for certiorari stage of the proceedings.

Presentments are defined as "an accusation of crime made by a grand jury on

its own motion upon its own knowledge or observation, or upon information from others, without any bill of indictment, . . . and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment." State v. Thomas, 236 N.C. 454 (1952) Likewise, presentments have also been defined as a "device whereby the grand jury brings to the attention of the district attorney subject matter which requires investigation by the district attorney and the submission of a properly drawn indictment to the grand jury when the facts so warrant." State v. Cole, 294 N.C. 304 (1978)

Remembering the presentment statutes as set forth in pertinent part in the earlier portions of this Jurisdictional Statement, it is apparent that these statutes require several specific and distinct actions on the part of the attorney for the State.

First, the grand jury has a matter brought to its attention upon its own motion, or by action of the presiding judge

or convening prosecutor. G.S. 15A-628(a)(4). Second, the grand jury investigates the matter, and, if probable cause is found to do so, issues a presentment naming one or more persons and charging them with one or more criminal offenses. G.S. 15A-628(a)(4) and G.S. 15A-641(c). Third, the district attorney or his staff conducts an investigation to determine if the factual allegations involved are appropriate for the drafting of a bill of indictment. G.S. 15A-641(c). Fourth, the grand jury examines the bill of indictment subsequently submitted by the district attorney, examines witnesses called before it to testify, and if probable cause is found to exist and the proper number of grand jurors concur, a true bill of indictment may be returned. This bill of indictment is the charging instrument, and is the means by which the district attorney invokes the powers of the court to commence a prosecution.

It is irresistible logic to presume that these steps, required if at all by the statutes read in pari materia, must take place in the sequence set forth

hereinabove. Therefore, the investigation of the district attorney must take place after the presentment is returned by the grand jury, not before it. However, in the instant case, the district attorney fully investigated the matter beforehand and drafted and handed to the grand jury foreman, at the same time, both the presentment and the bill of indictment. The documents herein were presented to the grand jury by the same assistant prosecutor who caused witnesses to be subpoenaed to the grand jury for testimony on the presentment and indictment, and this assistant prosecutor was one of the two prosecutors with whom the defendant had on more than one occasion become embroiled in heated and almost violent arguments over the defendant's handling of civil rights lawsuits against local law enforcement agents and agencies. The presentment procedures were mishandled by the grand jury's consideration of both presentment and indictment, without an intervening report back to the supervising court, as required by statute.

The law clearly requires that, when

a presentment is returned, it is to be returned to the Court, G.S. 15A-641(c), and then the district attorney is to take appropriate actions concerning investigating and drafting a bill of indictment to be later proffered to the grand jury for deliberation as to whether or not probable cause exists to return it a true bill. Such was not the case here, and although this issue is one of constitutional magnitude in the sense explained hereafter in Point V, it is raised first in this form, and alternatively in Point V, because of the State's misapplication of these statutes, to the detriment of defendant's constitutional rights.

POINT V

Although the State did not follow the procedures established by the statutes cited above, the N.C. Court of Appeals refused to examine this issue on the record, preferring instead to affirm the actions of the State on the ambiguous grounds that there was no merit in the above contention. If that is true, then the statutes, by logical extension, must permit the State to handle the problem of

presentments by doing exactly what the State did in this case, in the face of appositive requirements borne by a logical reading of the pertinent statutes. If such statutory language is subject to differing "proper" interpretations, then the potential for prosecutorial abuse of the criminal presentment procedures is unlimited. Such ambiguity and vagueness as has now apparently been approved by the N.C. appellate courts in the case sub judice, was specifically stricken by this Supreme Court in Winters v. New York, 333 U.S. 507 (1948), holding certain statutes void for vagueness, and in Lanzetta v. New Jersey, 306 U.S. 451:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law . . .

See also: Herndon v. Lowery, 301 U.S. 242 and Screws v. United States, 325 U.S. 91 (1945). Appellant contends that if these subject statutes are not void for vagueness, then they simply were not

followed in his case, thereby never giving jurisdiction to the superior court to try his case, and therefore denying him his constitutional right to due process. The latter is clearly a federal question of national import, and should be reviewed by this Court on this appeal.

POINT VI

In addition to disciplinary provisions of the judgment in the criminal case herein, the Court compounded its punishment in the form of a "civil" order imposing discipline on an attorney for misconduct arising out of his practice. Such misconduct alleged, it is important to note, did not take place in the presence of the court imposing discipline, but arose from defendant's handling of another case in another jurisdiction. What constitutional limitations of a due process, equal protection, and Eighth Amendment nature must be placed on such discipline?

The usual method of discipling attorneys in the State of North Carolina is by means of disciplinary procedures within the State Bar. In the instant case, a formal grievance was filed by Magistrate

Jerry P. Ray, the same magistrate previously identified as being involved in the going of bond count of the criminal indictment. Such grievance was filed on September 1, 1982, thus vesting jurisdiction in the N.C. State Bar to decide questions of discipline arising from the alleged misconduct. Various statutes provide enabling legislation for the creation, operation, and disciplinary rules and procedures of the N.C. State Bar, and are codified at G.S. 84-1, et seq. Those statutes provide stringent due process and equal protection safeguards for attorneys facing discipline for alleged misconduct, and provide, inter alia, at G.S. 84-29 that "depositions may be taken in any investigations of professional misconduct as in civil proceedings. . . ." While G.S. 84-36 provides that nothing contained in Chapter 84 "shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys," this section must be kept entirely within the context of Chapter 84. The courts have inherent power to discipline attorneys for actions done in the courtroom and which the court in question

observes; those actions alone can be the basis of summary punishment with a minimal of due process safeguards. All other disciplinary proceedings must be initiated by notice and strict observance of due process and equal protection safeguards. In re Burton, 257 N.C. 534 (1962).

In re Burton, supra, provides several important principles which were ignored by the court in the instant case: (1) disciplinary actions can be either statutory (N.C. State Bar) or judicial in nature, both of which are civil actions; (2) the right to practice law is a recognized property right which cannot be restricted or prohibited, once granted, without appropriate due process safeguards, including but not limited to written notice of what is charged; (3) courts may administer disciplinary action for misconduct not occurring in its presence only upon issuance of a rule to show cause based on a sworn, written complaint; (4) where the provisions of paragraph item "3" herein do not exist, a superior court has no authority to order the attorney to appear before him for hearing of the matter. The court in the

instant case decided to impose discipline despite prior knowledge of the N.C. Supreme Court's ruling in In Re Burton, supra, and did so, despite the clear import of North Carolina and federal constitutional law to the contrary. Furthermore, in McMichael v. Proctor, 243 N.C. 479, it was clearly stated that, since the enactment of Chapter 84, while ". . . the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, under our present statute questions of propriety and ethics are ordinarily for the consideration of the North Carolina [State] Bar . . . which is now vested with jurisdiction over such matters."

In the instant case, it was made to appear to counsel for the defendant early in the proceedings that a head of steam was building which indicated that disciplinary orders were coming, despite the lack of notice of same from opposing counsel or the trial court itself. Therefore, in light of the provisions of Chapter 84, defense counsel undertook to utilize the

provisions of Chapter 84 providing for the use of civil discovery, including depositions and subpoenas duces tecum to ensure the appearance of witnesses and production of documents for discovery purposes. The State moved for quashal of those subpoenas and notices of depositions of key witnesses, and the trial court granted those State motions, thus preventing the defendant from utilizing the due process safeguards built into Chapter 84. The court should not thereafter be permitted to use Chapter 84 to compound the defendant's punishment, in effect choosing those sections the State wishes to use and ignoring those sections of Chapter 84 which the defendant wishes to use.

Thereafter, upon the completion of the jury trial but prior to sentencing, the trial court informed the defendant's counsel that the trial court intended to enter an order, "civil" in nature, imposing discipline upon the defendant attorney for the conduct which resulted in the jury convictions for the two misdemeanors. The order stated that it was based on Section 36 of Chapter 84, the same Chapter 84

which the defendant was not permitted to use to his benefit earlier in the proceedings. Such a result is repugnant to the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, probable jurisdiction based on 28 U.S.C. 1257(2) should be noted herein, and in the alternative, certiorari should be granted pursuant to 28 U.S.C. 1257(3) to review all matters raised herein.

WAYNE EADS
The Nash Square Bldg.
227 W. Martin St.
Raleigh, N.C. 27601

Attorney for Appellant

Wayne Eads

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that three copies of the foregoing jurisdictional statement was served this date upon Appellee by placing same in the mail at the United States Post Office, postage prepaid, addressed to Mr. Charles H. Hobgood, Associate Attorney General, P.O. Box 629, Raleigh, N.C., 27611. This the 8th day of October, 1984.

Wayne Eads

APPENDIX A

No. 451P84 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
vs.)
)
DAVID H. ROGERS)

****

ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS (8310SC825)

****

Upon consideration of the Defendant's petition filed in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 9th day of August, 1984."

s/ Frye, J.
For the Court

Upon consideration of the Defendant's petition filed in this matter for Temporary Stay, the following order was entered and is hereby certified to the North Carolina Court of Appeals. The Petition for Temporary Stay is:

"Denied by order of the Court in conference, this the 9th day of August, 1984."

s/ Frye, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of August, 1984.

s/ J. Gregory Wallace
Clerk of the Supreme Court

Copy to: [Omitted]

APPENDIX B

NO. 8310SC825

NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 1984

STATE OF NORTH CAROLINA

v. Wake County
No. 82CRS63259

DAVID H. ROGERS

Appeal by defendant from Brannon, Judge. Judgment entered 7 March 1983 in Superior Court, Wake County. Heard in the Court of Appeals 13 February 1984.

Defendant, David H. Rogers, is an attorney licensed to practice law in North Carolina. Defendant was tried pursuant to a four-count indictment brought as a superseding indictment. Originally, defendant was indicted by the Wake County grand jury on 25 October 1982 in a three count indictment based upon the same incident and occurences as the superseding indictment. The three original counts charged the defendant, in substance, as follows: Count I, standing bail bond for a person not a member of the defendant's immediate family, in violation of G.S. 15A-541; Count II, improper solicitation of legal business by

an attorney, in violation of G.S. 84-38; and Count III, attempting to, and intimidating and interfering with a State's witness who was under subpoena to testify in a named case, in violation of G.S. 14-226.

On 14 February 1983, defendant successfully moved to quash and dismiss the third count of the original indictment for failure to state an offense under the provisions of G.S. 15A-924. The third count of the original indictment was then dismissed by the presiding judge. Thereafter, the State, through its Special Prosecutor, Assistant Attorney General Charles H. Hobgood, returned to the grand jury and obtained a superseding indictment on 15 February 1983. In the superseding indictment, Count I remained the same, Count II was reworded, but still charged soliciting legal business, and Count III was broken down into two counts. New Count III charged intimidating and attempting to intimidate a State's witness who was under subpoena to testify in a named case, in violation of G.S. 14-226. New Count IV charged interfering and attempting to interfere with a State's witness and prevent him from testifying by offering to have his damages paid, in violation of G.S. 14-

226. The State then dismissed the original indictment.

Following four days of pretrial motion hearings, defendant went to trial on the four-count superseding indictment before the Wake County Superior Court and jury. The court ruled, inter alia, that Counts III and IV would be considered together as a single count and instructed the jury accordingly. Defendant was convicted for Count I, standing bond for a person not a member of his immediate family, and for Count IV, attempting to interfere with a State's witness.

Judgment was entered on those verdicts, and the defendant was sentenced to a term of imprisonment of six months on Count I and of two years on Count IV. These sentences were to run concurrently and were suspended for five years, with defendant placed on unsupervised probation for five years. Among the terms and conditions of probation was the requirement that defendant surrender his law license to the North Carolina State Bar and cease the practice of law for a period of not to exceed 18 months, to be shortened to as little as six months if he satisfies the State Bar with regard, inter alia, to his moral qualifications, competency and

legal knowledge. In addition, the court entered a civil order imposing the identical discipline upon defendant under the court's summary jurisdiction to discipline attorneys. Defendant appeals from both the criminal judgment and sentence and the civil order.

Attorney General Edmisten, by Associate Attorney General Charles H. Hobgood, for the State.

Wayne Eads, for defendant appellant.

JOHNSON, Judge.

Defendant presents 15 questions for review broadly concerning the issues of (1) whether the indictment should have been quashed and the charges dismissed on the grounds that the prosecution against him was based on unconstitutional selective prosecution; (2) whether the superseding indictment should have been quashed and the charges dismissed on the ground of unconstitutional vindictive prosecution; (3) the sufficiency of the evidence to withstand defendant's motion to dismiss; and (4) whether the court abused its discretion in imposing a probationary judgment temporarily suspending defendant's license to practice law for his criminal offenses and also in entering a civil order

imposing the identical discipline under the court's inherent authority to discipline attorneys.

The defendant was initially indicted for violating several criminal statutes prohibiting attorneys for engaging in certain conduct and for obstructing justice by intimidating or interfering with a State's witness. All of the alleged violations arose out of defendant's initial connection with and representation of Paula Ann Gately, who was charged with driving under the influence and with hit and run. We will address defendant's arguments in order of convenience and begin with the factual background leading up to the decision to prosecute defendant.

I

The evidence at defendant's trial tended to show the following: On 7 July 1982, between 2:00 and 2:30 a.m., the defendant, a licensed attorney was in the Wake County Magistrate's Office. The magistrate on duty that night was Jerry Ray. Magistrate Ray testified that he had seen Attorney Rogers at the back of the courthouse late at night on other occasions.

Earlier that same night, Paula Ann

Gately had gone to Darryl's Restaurant on Glenwood Avenue in Raleigh. There she drank a number of alcoholic beverages and, according to the arresting officer, became "very intoxicated." Ms. Gately remembered leaving Darryl's and pulling out onto Glenwood Avenue, but little that occurred thereafter.

At the same time that Gately pulled out onto Glenwood Avenue, a man named Bobby McMillan was driving on Glenwood Avenue, near Darryl's. Gately drove through a flashing red light, pulled out in front of McMillan and the two cars collided. Gately drove away with McMillan driving after her. Eventually, he caught up to talk to her, but she drove off again. McMillan reported the accident to the Raleigh Police Department and Officer Mizelle arrived to investigate. Eventually, Officer Mizelle located Gately's parked car, found Gately herself, placed her under arrest and took her to the Magistrate's Office.

Magistrate Ray charged Gately with driving under the influence and with hit and run and placed her under a $100 secured bond. Rogers, who had been listening, then discussed something with Gately outside the office,

and returned to notify Magistrate Ray that he was going to post Gately's bond. Magistrate Ray informed him that "the statute, [G.S.] 85C-22[1/] states that attorneys are not allowed to sign bail bonds for defendants." Rogers said that he had to go and get the hundred dollars and, after a second warning from Magistrate Ray, said that he was "loaning" Gately the money. When Rogers returned, Magistrate Ray again informed him of the statute. In the meantime, the magistrate had taken out the General Statute book so that Rogers could read it if he wanted to. Without doing so, Rogers told Magistrate Ray that he was "aware" of the statute and again informed Ray that he was going to post the bond, that he was not representing Gately in court and was just loaning her the money. Rogers then paid the $100 and signed the bond as surety. He was not related to Gately.

1/ G.S. 85C-22 states, in pertinent part, that, "No...attorney...may in any case become surety on a bail bond for any person....Provided, however, nothing herein shall prohibit any person above designated from being surety upon the bond of his or her spouse, parent, brother, sister, child or descendent. G.S. 15A-541(a) contains a substantially identical prohibition and subsection (b) provides that violation of that section is a misdemeanor.

Rogers and Gately left the office together and he drove her home. In his car, Rogers gave Gately his business card and she gave him her court papers; each considered Rogers to be her attorney. The next day, Gately telephoned McMillan. She offered to pay him $150 for his damages. McMillan informed Gately that her leaving the accident had been dangerous because he'd been carrying a gun that night. McMillan had left it in the holster and did not point it at her. According to McMillan, Gately did not remember the events of that evening. Gately then sent McMillan a check, but stopped payment upon Rogers' advice.

Prior to the trial of Gately's cases, Rogers requested that he be taken off Gately's bond, telling the Clerk's Administrative Assistant that he had done it as a "friend" and was not going to represent Gately. On 19 August 1982, Gately's cases were scheduled for trial in Wake County District Court. Gately testified that she went to court with Rogers because he was her attorney. McMillan had been subpoenaed as a witness for the State, but was late in arriving. Officer Mizelle was present and told Rogers that he hadn't seen McMillan.

Rogers said ". . .if he doesn't show up, we'll have the case dismissed. . . ."

When Assistant District Attorney Mary Dombalis called Gately's cases, Rogers stood up and said he represented Gately and that the plea was not guilty. The Assistant District Attorney testified that a few minutes later Rogers said to her that her witness "was not there and if the witness did not show up I'd have to dismiss the case." Eventually, McMillan arrived and when he answered to the call of his name, Rogers muttered "shit" and motioned for Gately to meet him in the attorneys' conference room.

Rogers also asked Officer Mizelle to come into the conference room. Present at this meeting were Rogers, McMillan, Gately and Officer Mizelle, but not the District Attorney. Rogers discussed the accident with McMillan. He told McMillan that Gately was "willing to take care of" his damages and then asked McMillan whether he'd been carrying a gun that night. When McMillan told him, "yeah," Rogers said something to the effect that "we could bring charges on you for having that gun." Further, that McMillan was the only one actually to see Gately driving drunk and that he would have

a good chance of getting Gately's cases thrown out if McMillan was not a witness. McMillan testified that he "got the understanding" that if he did not press charges and did not appear as a witness his damages would be paid. Also, that if McMillan brought Rogers his bill, Rogers and Gately would not bring any charges against McMillan about his gun. Rogers indicated that it was his opinion that the case would probably be dropped, and that McMillan would not be needed. They shook hands and Rogers told McMillan, "you can hit the door."

On the way out, McMillan had second thoughts and informed the witness coordinator that Rogers had told him to leave. McMillan was told to return to the courtroom. Thereafter, the Assistant District Attorney was informed of the conference and of the agreement between McMillan and Rogers. Rogers had not spoken to her about Gately's cases since the calendar call, although he had the opportunity to do so. She, therefore, requested the court that Gately's cases be continued. Rogers stood up and insisted that he was ready for trial. When the judge asked Rogers if he had dismissed the State's witness, Rogers initially at-

tempted to discuss the merits of the case, but eventually admitted that he had told the witness to leave.

That day or the next, Rogers contacted Gately and advised her to take out a warrant against McMillan for assault by pointing a gun. Although Gately had told Rogers that she did not remember the incident, she agreed and Rogers accompanied her to the Magistrate's Office. A warrant was taken out against McMillan, with David Rogers listed on the warrant as a witness. McMillan was then charged, taken to the police station, fingerprinted and photographed. A week later, Gately attempted to have the charges dropped because she thought it was vindictive and because she did not actually remember the event occurring.

Thereafter, Attorney Rogers was charged with illegally becoming a surety, soliciting business and obstruction of justice. After the State rested its case, defendant moved to dismiss each count and his motions were denied. The defendant put on evidence and testified on his own behalf. Essentially, defendant pled ignorance of the law at his trial. Defendant testified that he was working late on a case on the night in

question and had gone over to the Magistrate's Office in the early morning hours to clarify something. He testified further that when he attempted to act as surety on Gately's bail bond, the magistrate told him: "don't you know that an attorney cannot go bond for his client," but that Gately was not his client at that point and he wanted to do it as a friend, because he felt sorry for her. His practice was mostly civil, and he was not aware of the statute referred to by the magistrate prior to that time.

As to the events in the conference room on the morning of Gately's trial, Rogers testified that at no time was the payment of McMillan's expenses and damages conditioned on his not prosecuting the hit and run charge. Rather, defendant believed that the conversation was for the purpose of reaching a plea bargain and settlement of the entire situation, including both the civil and criminal aspects of the Gately-McMillan incidents. Defendant testified further that in dismissing the State's witness, he had exercised "bad judgment."

After rebuttal evidence for the State, defendant again moved for dismissal of all four counts. These motions were denied and

the jury found defendant guilty of standing bond for a person not a member of the defendant's immediate family and attempting to interfere with the witness Bobby McMillan by offering to have money paid if he did not appear and testify.

II

Defendant contends that he made a sufficient showing that he was a victim of unconstitutional selective prosecution to warrant dismissal of the indictment and charges against him. We do not agree.

A

The test for determining the limits of constitutionally permissible selective prosecution was first expressly articulated by the United States Supreme Court in Oyler v. Boyles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962). In Oyler, the petitioner claimed he was discriminated against because he was prosecuted and sentenced as a "habitual offender" as a result of his former Juvenile Court convictions while six other men, sentenced in the same court and subject to prosecution as habitual offenders as a result of three or more adult felony convictions, were not prosecuted as "habitual offenders." The Court first noted that

the petition had failed to state whether the prosecutor had failed to proceed against the other three-time offenders due to a lack of knowledge of their prior offenses or as a result of a deliberate policy to proceed only in a certain class of cases or against specific persons. Finding that the allegations "set out no more than a failure to prosecute others because of a lack of knowledge" that they were subject to prosecution for the same offense as petitioner, the court held that petitioner had not been denied equal protection under the Fourteenth Amendment. Continuing, the Court stated:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore grounds supporting a finding of denial of equal protection were not alleged. State v. Hicks [213 Or. 619, 325 P.2d 794 (1958)]; cf. Snowden v. Hughes, 321 U.S. 1, [64 S.Ct. 397, 88 L.Ed. 497](1944); Yick Wo v. Hopkins, 118 U.S. 356, [6 S.Ct. 1064, 30 L.Ed. 220](1886) (by implication).[2]

368 U.S. at 456, 82 S.Ct. at 506, 7 L.Ed.2d at 453.

Following Oyler and Yick Wo, the federal courts have generally recognized a two-part test for discriminatory prosecution similar to that stated in United States v. Greene, 697 F.2d 1229, 1234 (5th Cir.), cert. denied, U.S. , 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983).

> To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not. (Citations omitted). If a defendant meets this first showing, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

2/ In Yick Wo the court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial

See e.g. United States v. Ness, 652 F.2d 890 (9th Cir.), cert. denied, 454 U.S. 1126, 102 S.Ct. 976, 71 L.Ed.2d 113 (1981)(initial decision to prosecute must not be based on an "impermissible motive"); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (prosecution based on exercise of "First Amendment" rights is impermissible); United States v. Wilson, 639 F.2d 500 (9th Cir. 1981)(prosecution based on exercise of constitutional rights is impermissible); Wheaton v. Hagan, 435 F.Supp. 1134 (M.D.N.C. 1977)("constitutionally" impermissible ground). See generally 45 A.L.R. Fed. 732 (1979).

Our Supreme Court, following Yick Wo, recognized the defense under the equal protection clause of Art. I, §19 of the Constitution of North Carolina in Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971). The court initially observed that the constitutional protection against unreasonable discrimination between persons in similar circumstances under color of law is not limited to the enactment of legislation,

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of equal justice is still within the prohibition of the Constitution. 118 U.S. at 373-374, 6 S.Ct. at 1073, 30 L.Ed. at 227.

but "extends also to the administration and the execution of laws valid on their face." 277 N.C. at 660, 178 S.E.2d at 385, citing Yick Wo v. Hopkins, supra. Continuing, the court distinguished unequal administration or enforcement of the law from unconstitutional discriminatory enforcement of the law.

> One who violates a law, valid upon its face, does not bring himself within the protection of the Yick Wo rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefore. Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable. Even selective enforcement does not have that effect if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major source of criminal activity.

Id. at 661, 178 S.E.2d at 386. In deference to the need for prosecutorial discretion in weighing such factors as the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the state, and the prosecutor's own sense of justice in the particu-

lar case, the court held that selectivity does not constitute a denial of equal protection unless there is shown to be present in the decision to prosecute an element of intentional or purposeful discrimination. Further, that such discriminatory purpose is not presumed; rather, the good faith of the officers is presumed and the burden is upon the complainant to show the intentional or purposeful discrimination upon which he relies. 277 N.C. at 662, 178 S.E.2d at 386. See also State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980). The requirements of discriminatory prosecution in Kresge are substantially in accord with those followed in ohter states. See generally 95 A.L.R. 3d 280 (1979) and cases collected therein.

B

In an attempt to satisfy the first part of the selective prosecution test, the defendant conducted extensive discovery to determine whether other persons have been prosecuted in the Tenth Judicial District for conduct of the type forming the basis of the charges against him. As a result of this discovery, defendant has constructed five classes and argues that he is the only one

to have been prosecuted within those classes. All the classes pertain to persons engaging in the questioned conduct since the date that J. Randolph Riley took office as District Attorney in Wake County, North Carolina, and all such conduct pertains to that time frame and county. The classes are as follows:

> 1. All persons charged solely with misdemeanor offenses who have been prosecuted on those misdemeanors by initiation of charges in the Superior Court through the use of the statutory presentment procedure.
>
> 2. All attorneys who have signed a surety bond for a person not a member of their immediate families.
>
> 3. All attorneys charged with a criminal misdemeanor who were prosecuted originally in the Superior Court through the presentment procedure.
>
> 4. All attorneys who have, or may have, solicited legal business, directly or indirectly, in Wake County.
>
> 5. The persons who were present and actually took part in the activities involved in Counts I and III of the indictment, out of which activities this prosecution arose.

At the outset we may summarily dispose with consideration of classes one, three and four for the following reasons (1) the

defendant was found not guilty of improperly soliciting legal business and therefore defendant's fourth proposed class is irrelevant with respect to this appeal and (2) defendant's proposed classes one and three relate to the manner in which the indictment was obtained rather than to the decision to seek an indictment for the conduct at issue, and are therefore not at all germane to the issue of selective prosecution.3/

Of the remaining classes, numbers two and five relate solely to the charge of having improperly signed a surety bond. Defendant's second proposed class consists of all attorneys in Wake County who signed surety bonds for persons not members of their immediate families, in violation of

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3/ Defendant raises a number of constitutional issues relating to the fact that the prosecutor chose to bring charges against him initially in Superior Court under the presentment statutes, G.S. 15A-628(a)(4) and G.S. 15A-641(c), rather than prosecuting him originally in the District Court, from which defendant could have appealed his conviction for trial de novo in the Superior Court and thus secure a "second bite at the apple." Defendant also contends that the presentment statutes were not properly followed in this case and are unconstitutionally vague. We have carefully examined all of defendant's arguments regarding the initiation of charges against him under the presentment statutes and find them to be wholly without merit.

G.S. 15A-541. Defendant's fifth proposed class consists of the defendant, Magistrate Ray, and Officer Mizelle. The defendant argues that Ray and Mizelle should have been prosecuted as aiders and abettors because they had the opportunity and duty to prevent him from signing the bond and they failed to do so. Even assuming arguendo that they were subject to prosecution, it is routine prosecutorial practice to refrain from prosecuting some participants in order to secure their testimony as State's witnesses against the most culpable party. Under defendant's theory all undercover agents engaged in, for example, drug operations would have to be prosecuted. We find the fifth class inappropriate. See Bell v. State, 369 So.2d 932 (Fla. 1979)(failure to prosecute policemen as well as defendants for various violations of law relating, inter alia, to lewdness, did not constitute selective and discriminatory enforcement even though policemen upon whose evidence information was based, were guilty participants along with defendants; mere failure to prosecute all offenders is no ground for claim of denial of constitutional guarantees of equal protection).

At the hearing on his motion, defendant offered to prove that an impermissible motive underlay the decision to prosecute him, based upon the following facts: (1) he handled malicious prosecution and false arrest cases, (2) he filed two law suits against police officers, (3) he had an argument with Assistant District Attorney William Hart, and (4) he has incurred the wrath of the District Attorney's staff by "handling several unpopular causes in an extremely uncongenial and uncompromising manner."

C

Although the trial court did not conduct a full evidentiary hearing[4/] and take the testimony of witnesses, the court did consider defendant's proffer of proof and statements made by the attorneys which, without objection, were received as evidence. Based on these, the court made extensive findings of fact and conclusions of law that the prosecution did not result from impermissible considerations.

4/ Defendant also contends that he at least made a prima facie showing of discriminatory prosecution and was therefore entitled to a full evidentiary hearing on his motion to dismiss the indictment. The federal courts have apparently held that a defendant must make a nonfrivolous prima facie showing

With regard to the first prong of the selective prosecution test, the trial court found as a fact that defendant had only shown that one other attorney in Wake County actually became a surety on a bail bond during the relevant time period and that the actions of said attorney were not called to the attention of or known by the District Attorney's office for the Tenth Judicial District. Additionally, the court found that "no other attorneys in Wake County have been shown to have been involved in the illegal solicitation of business or in the intimidation or interference with witnesses." With regard to the second prong of the test, the trial court's key findings of fact were that the defendant's case was referred by J. Ran-

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before becoming entitled to an evidentiary hearing on a selective prosecution claim. See e.g., United States v. Ness, supra at 892. Similarly, in State v. Spicer, supra, our Supreme Court recognized that a full evidentiary hearing is not mandated by the requirements of due process in every selective prosecution case. The trial court ruled that defendant had not made a prima facie showing of discriminatory prosecution so as to entitled him to a full evidentiary hearing. The hearing afforded the defendant in this case met the requirements of due process and we find no error in the denial of defendant's request for a full evidentiary hearing. See discussion, infra, of defendant's substantive claims.

dolph Riley, District Attorney for the 10th Judicial District, to the Special Prosecutions Division of the Attorney General's Office; that the decision to prosecute the defendant was made solely by Associate Attorney General Charles Hobgood; and that no one from the 10th Judicial District District Attorney's Office suggested, persuaded, discussed, or took any action to affect the decision of the special prosecutor as to whether the defendant should be prosecuted. Further, that no one in the District Attorney's Office acted in bad faith in referring the case to the Special Prosecutions Division; that to the contrary, the referral was made to avoid any conflict and to avoid the appearance of impropriety since one of the Assistant District Attorneys was a potential witness; and that no one in the Special Prosecutions Division acted with bad faith, vindictiveness, or discrimination in the investigation of the case and decision to proceed to the grand jury by way of presentment and indictment. The court also found that there were no facts that would indicate an impermissible motive to investigate and prosecute the case and that the ultimate decision to prosecute was made "simply, solely,

exclusively, and entirely by the grand jury on the one hand and the Special Prosecutions Division on the other hand; and that these bodies were several steps removed from and independent of the District Attorney's Office for the Tenth Judicial District."

A trial court's findings of fact are conclusive on appeal if supported by the evidence, State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 970, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980), and will not be reversed on appeal unless shown to be "clearly erroneous." United States v. Wilson, supra at 503. In the present case, the trial court's findings were supported by the evidence and are not clearly erroneous.

At the pretrial hearing, defendant's documentary evidence disclosed that only he and one other local attorney had become sureties on bail bonds during the tenure of District Attorney J. Randolph Riley. Defendant argues in effect, that in addition to this evidence, the testimony of Magistrate Ray supports a conclusion that many other attorneys in Wake County have acted as surety for non-family members in criminal cases and have not been prosecuted for doing so.

It is noteworthy that our research has disclosed no reported cases under G.S. 15A-541, nor the prior statutory provision it expanded upon, G.S. 15-107.1 (Repealed by Session Laws 1975, c. 166, s. 26). See Official Commentary, G.S. 15A-541. In addition, there are very few reported cases under G.S. 14-226. These factors, however, either alone or in conjunction with defendant's other evidence, do not establish impermissible selectivity in the enforcement of the statutes. Furthermore, the testimony of Magistrate Ray does not support defendant's contentions.

The magistrate testified that at one time the Office had had a "problem" with attorneys attempting to sign bonds. In response, a policy was developed whereby the attorney was informed of the statutory prohibition and if he insisted upon signing the bond, he was permitted to do so, but a record would be kept for the office files. It was not "the policy" to prohibit signing, or to bring charges. However, Ray testified further that the "problem" was "more prevelent" when he first became a magistrate some 11 years prior and that today it was "very rare" to see that problem. In addition,

Ray's testimony indicated that in three cases he personally handled, other attorneys had attempted to sign bonds, but did not ultimately do so.

At any rate, by defendant's own definition, the second proposed class is limited to attorneys who signed bonds after J. Randolph Riley became District Attorney in 1977 and that class has only two documented members. It would appear that a class of two members is too statistically small a sampling to accurately measure a claim of selective prosecution. See State v. Spicer, supra. Compare United States v. Wilson, supra (first part of selective prosecution test met by a showing that only two persons out of approximately 425 who filed "exempt" W-4 tax forms in Arizona were prosecuted) and United States v. Greene, supra (test satisfied with a showing that of the approximately 300 air traffic control specialists who failed to report for work in the Dallas-Fort Worth area, only six individuals, including the three defendants, were prosecuted). However, assuming arguendo that defendant has prima facie satisfied the first part of the test, he nonetheless failed to present evidence which convinc-

ingly shows that he was deliberately prosecuted on the basis of any impermissible ground.

First, defendant presented no evidence to show that the other attorney who became a surety on a bail bond during District Attorney Riley's tenure was called to the attention of a prosecutor. The other attorney was never questioned by a law enforcement officer or official. Moreover, the record discloses that it was after the discovery that the defendant had interfered with a witness, that it was discovered that defendant was surety on his client's bond.5/ An investigation of the bond incident revealed that the defendant had become a surety after being warned against doing so by the magistrate. In contrast, the other local attorney never represented the principal and immediately withdrew as surety. To some extent, therefore, the other attorney and defendant were not "similarly situated."

Based upon its findings of fact, the

5/ Rule 20 of the Superior and District Court Rules also prohibits an attorney from acting as surety in any case, suit, action or proceeding in which he appears as counsel. See General Statutes, Appendix I, Superior and District Court Rules.

trial court concluded that there was "no showing that others similarly situated to the defendant had not been prosecuted because of conduct of the type forming the basis of the charges against defendant and the prosecutorial failure, if any, to proceed against any such person was motivated by nothing more than a failure to have any knowledge of such acts or offenses; and that, therefore, the defendant's motion to quash should be denied." In addition, the trial court rested its decision upon two further independent and alternative grounds for denying defendant's motion to dismiss. These conclusions of law are as follows:

> 3. That as a separate, independent, and alternative ground for denying the defendant's motion to quash, there has been no showing that either J. Randolph Riley, any member of the District Attorney's Office for the Tenth Judicial District, Detective A. C. Mundy, Charles H. Hobgood or any member of the Special Prosecutions Division, or the Grand Jury discriminated against the defendant or acted in bad faith or acted with vindictiveness or selected the defendant for prosecution based on impermissible grounds such as race, religion, sex, creed, occupation, performance of members in their profession, or any other possible field of arbitrary classifi-

> cation whatsoever, or any constitutional rights, including but not limited to First Amendment freedom of speech considerations; and that, therefore, the defendant's motion to quash should be denied.
>
> 4. That as a separate, independent, and alternative ground for denying the defendant's motion to quash, that the autonomy of the actual charging authority, that is, the Grand Jury and/or the Special Prosecutions Division, as against whom there has been no allegational showing of any bad faith, discrimination, or vindictiveness, insulates and makes immaterial any alleged taint of bad faith, vindictiveness, or intentional discrimination on the part of any member of the District Attorney's Office for the Tenth Judicial District or any investigating officer; and therefore, the defendant's motion to quash should be denied.

We find no error in the trial court's conclusions of law.

D

First, it is clear that a failure to prosecute others because of a lack of knowledge that they were subject to prosecution for the same offense as defendant does not amount to a denial of equal protection under the Fourteenth Amendment. Oyler v. Boyles, supra. Furthermore, a showing of

the "mere laxity, delay or inefficiency" of the prosecutor in the enforcement of a statute does not render it unenforceable. Kresge Co. v. Davis, supra. Nor does a showing of mere selectivity alone entitle a defendant to prevail on his claim because it is necessary to prove that the decision to prosecute contained "an element of intentional or purposeful discrimination," id.; State v. Spicer ("intentional or deliberate discrimination"). Defendant has not made such a showing.

Although defendant stated that he believed he was prosecuted because of prosecutorial hostility engendered by his representation of clients in cases against law enforcement officers and officials, and because of particular acrimonious dealings he'd had with the District Attorney's Office, these allegations were not supported by the facts of record and reflect mainly defendant's own subjective beliefs. "Speculative and tenuous" allegations of impermissible prosecutorial motive which are unsupported by evidence of a causal link between the defendant's "hostility" provoking conduct and the decision to prosecute are insufficient to support a claim of discrimina-

tory prosecution. United States v. Erne, 576 F.2d 212, 216 n. 4 (9th Cir. 1978).

"District Attorney's have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted." State v. Spicer, supra, 299 N.C. at 311, 261 S.E.2d at 895. Defendant has failed to produce factual evidence to show that but for his alleged problems with the District Attorney's Office he would not have been prosecuted.

> Vindictive prosecution only requires a substantial "appearance" of vindictiveness, but selective prosecution requires a finding that the decision to prosecute was based on impermissible grounds.

United States v. Wilson, supra, 639 F.2d at 503, n. 2. Defendant cannot, therefore, rely on appearances.

More importantly, defendant's allegations, even if true, are focused upon members of the District Attorney's Office. The record is clear, however, that the ultimate decision to prosecute was not made by anyone in that office, but by an independent special prosecutor. The trial court specifically found and concluded that the Speci-

al Prosecutions Division did not act in bad faith or for an impermissible motive. This finding is supported by statements of counsel and no allegation to the contrary is made. The findings of fact in turn also support the trial court's separate and alternative conclusion of law that any possible bad faith on the part of the District Attorney's Office was insulated when the case was referred to an autonomous charging body, the Special Prosecutions Division of the Attorney General's Office, pursuant to G.S. 114-11.6.

The special prosecutor testified that one of his duties was to try cases "where a conflict arises in the local District Attorney's Office and the local District Attorney wants to remove even the appearance of anything improper. Therefore, our value at least on my part, is not being an expert on the criminal law but rather being an outsider, someone who comes in and makes an independent judgment and this is what I have attempted to do in this case." The federal courts have recognized that referring a case to an independent prosecutor ordinarily insulates any original impermissible motive that may have existed on the part of the re-

ferring officer. See United States v. Erne, supra, 576 F.2d at 216-217 (possible improper discriminatory motive on part of the initial IRS agent prior to referral was insufficient to taint entire administrative process). See also United States v. Gervasi, 562 F.Supp. 632 (N.D. Ill., E.D. 1983)(alleged vindictiveness on the part of initial state prosecutors is not attributable to subsequent federal prosecutors).

In summary, the defendant has failed to carry his burden of either showing that he was singled out for prosecution or that an invidious purpose invaded or overrode the prosecutorial decision to seek a presentment and indictment against him. Accordingly, the trial court correctly denied defendant's motion to dismiss the indictment on the basis of selective and discriminatory prosecution.

III

Defendant also challenges the trial court's denial of his motion to quash and dismiss the superseding indictment on the ground that it was obtained as a result of impermissible prosecutorial vindictiveness in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Defendant argues that the addition of a fourth count in the superseding indictment increased the charges against him and increased his potential punishment, thereby entitling defendant to a presumption of prosecutorial vindictiveness. Defendant argues further that the presumed vindictiveness, or appearance of vindictiveness, was not satisfactorily countered or explained by the prosecutor and that he is therefore entitled to have his conviction vacated and the charges dismissed. We do not agree.

First, the defendant's claim of vindictiveness depends upon acceptance of his characterization of the superseding indictment as imposing <u>additional</u> charges and subjecting him to <u>increased</u> punishment. However, the record does not support this claim. As to punishment, the trial court ruled that Counts III and IV, intimidating and interfering with a witness, would be considered to be one offense for the purposes of trial. Later, the trial court instructed the jury and framed the issues so that the jury could find the defendant guilty of no more than one offense. Therefore, the defendant was not subjected to increased punishment as a result of the second indictment.

Furthermore, the record reveals that defendant moved to dismiss Count III of the original indictment pursuant to G.S. 15A-954(a)(10) and G.S. 15A-952(d) for failure to state an offense as required by G.S. 15A-924(a)(5). In essence, that statutory provision requires that a criminal pleading contain a "plain and concise" factual statement in each count which asserts facts supporting every element of the criminal offense with sufficient precision to apprise the defendant of the conduct which is the subject of the accusation. Although original Count III failed to allege specific facts in support of the elements of the offenses charged, it did allege that defendant "did unlawfully, willfully and intentionally attempt to interfere with, attempt to deter, attempt to intimidate, attempt to prevent and did interfere with, deter, intimidate, and prevent" witness Bobby McMillan from attending and testifying in court in violation of G.S. 14-226, "intimidating or interfering with witnesses." Moreover, it is clear that the real problem with original Count III lay not in its failure to state an offense, but rather in the fact that it stated four separate offenses (two

acts of attempt and two acts of commission) in a single count, and was therefore properly subject to quashal and dismissal. See G.S. 15A-924(b)(a duplicitous count is subject to a defendant's motion to dismiss if, inter alia, the state fails to make a timely election). In other words, the prosecutor included all of the potential charges against defendant stemming from his conversation with witness McMillan on 19 August 1982 in the original indictment, and the superseding indictment contained no new or additional charge of a criminal offense that was not originally alleged.

Where a motion to quash is granted, the defendant is not entitled to a discharge, but is subject to further prosecution on a new indictment. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961). The trial court's order of dismissal forced the prosecutor to review the facts and the law and decide whether to seek a second and more perfectly drawn indictment. The special prosecutor testified that upon review, he thought that Count III "might be possibly duplicitous and that is the reason I put [it], therefore, in the two separate counts." He characterized his motive as "an attempt to be very very care-

ful in pleading. Your Honor has [sic] just quashed the. . .third count of the indictment and I certainly did not want to have that count quashed a second time. It would not have looked good for the State, therefore, I tried very hard to draft this as carefully as I could to pass mustard [sic]."

Nothing else appearing, it is entirely proper for the prosecutor to seek a second and more perfect indictment. State v. Moffitt, 9 N.C.App. 694, 177 S.E.2d 324 (1970), cert. denied, 281 N.C. 626, 190 S.E.2d 472 (1972). The gist of the offense under G.S. 14-226 is the obstruction of justice. State v. Neely, 4 N.C.App. 475, 166 S.E.2d 878 (1969). As explained to the trial court, the prosecutor concluded that G.S. 14-226 prohibited two distinct offenses -- (1) intimidating and (2) interfering with witnesses. The allegations contained in original Count III were then divided into two counts in order to avoid any possibility of having the second indictment quashed on the ground of duplicity. "Ordinarily, an indictment which charges two separate offenses in a single count is bad for duplicity." State v. Beaver, 14 N.C.App. 459, 461, 188 S.E.2d 576, 578 (1972). Provided that the charges

were originally set out in the defective indictment, the prosecutor may upon motion and leave of court amend the indictment and state the charges upon which he desires to proceed at trial in separate counts. Id.; State v. Williamson, 250 N.C. 204, 108 S.E. 2d 443 (1959). Essentially, this is what occurred in the case under discussion, and under the circumstances, defendant has shown neither an increase in the number of charges brought against him nor an increase in his potential punishment under the superseding indictment.

B

Second, even if defendant had been subjected to additional charges and increased punishment under the superseding indictment, he has demonstrated no denial of due process. Defendant has neither alleged actual vindictiveness nor shown himself to be entitled to a presumption of prosecutorial vindictiveness under current constitutional doctrine. As was aptly stated in United States v. Gallegos-Curiel, 681 F.2d 1164, 1167 (9th Cir. 1982):

> The doctrine of vindictive prosecution must not be misapplied by blurring the distinction between what is actual retaliation and what is pre-

> sumed. The presumption applies only to the extent it reflects the very real likelihood actual vindictiveness.

The doctrine of presumed vindictiveness was first developed in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), in recognition of the fact that the existence of a retaliatory motive in any particular case would be extremely difficult to prove. There the Court acknowledged that due process guarantees that a defendant may not be punished for successfully challenging his conviction, and in order to assure the absence of such a retaliatory motivation, held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must appear. If no such objective reasons appear in the record, vindictiveness can be presumed.

In Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), the Court considered the presumption of vindictiveness in the context of prosecutorial behavior. There the defendant was convicted of a misdemeanor in District Court. He then appealed to the Superior Court. Before his misdemeanor trial de novo was held, the pro-

secutor obtained a felony indictment against the defendant, covering the same conduct charged in the misdemeanor warrant. The Court observed that under the two-tier system the prosecutor has a considerable stake in discouraging convicted misdemeanants from appealing and obtaining a trial de novo, and that the opportunities for vindictiveness presented thereby were such "as to impel the conclusion that due process of law requires a rule analogous to that of the Pearce case." 417 U.S. at 27, 94 S.Ct. at 2102, 40 L.Ed. 2d at 634. In so ruling, the Court emphasized that

> the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness."

Id.

The availability of the presumption of vindictiveness in the context of pretrial proceedings was definitively addressed by the Supreme Court in United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed. 2d 74 (1982). There, the defendant requested a jury trial on pending misdemeanor charges after unsuccessful plea negotiations with the prosecutor. After the case was

assigned to an Assistant United States Attorney, the defendant was indicted and convicted on a felony charge. He alleged vindictive prosecution. The Supreme Court analyzed the timing and nature of the right which the defendant had exercised, concluded that the circumstances did not present a realistic likelihood of vindictiveness and held that a presumption of vindictiveness was not warranted in that pretrial setting.

First, the Court cautioned against adopting an inflexible presumption of prosecutorial vindictiveness in any pretrial setting.

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystalized. In contrast, once a trial begins -- and certainly by the time a conviction has been obtained -- it is much more likely that the state has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which

> he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

457 U.S. at 381, 102 S.Ct. at 2493, 73 L. Ed.2d at 85. The Court continued:

> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial-motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Id. at 481, 102 S.Ct. at 2493, 73 L.Ed.2d at 85-86.

After considering the timing of the defendant's action, the Goodwin court analyzed the nature of the rights asserted -- the not guilty plea and request for a jury trial -- and concluded that these did not

force the duplicative expenditure of prosecutorial resources as did the asserted rights in Pearce and Blackledge. In those cases, it was feared that the institutional bias against the retrial of decided issues and the possibility that a formerly convicted defendant might go free might motivate a retaliatory or vindictive reaction. The same considerations were not implicated by the pretrial plea of not guilty and request for a jury trial.

Following the standards established in Pearce, Blackledge and Goodwin, the Ninth Circuit Court of Appeals, in United States v. Gallegos-Curiel, supra, stated the rule as follows:

> When there is no evidence of actual vindictiveness and the only question is whether it must be presumed, cases involving increased charges or punishments after trial are to be sharply distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings.
>
> * * *
>
> In every case alleging inferred vindictive prosecution, there must be a threshold showing of vindictiveness or the likelihood of it before the court is justified in inquiring into the pro-

> secutor's actual motives. The exercise of routine or clearly necessary defense motions in the pretrial stage does not meet the threshold for more detailed inquiry and does not suffice to raise the presumption of vindictiveness.

681 F.2d at 1167, 1169.

Defendant Rogers contends that he is entitled to the presumption of prosecutorial vindictiveness because the second indictment, with its increased number of charges, was not brought as a result of any newly discovered evidence but simply as an immediate reaction to the defendant's successful exercise of his statutory right to move for dismissal of one of the counts of the original indictment. Defendant contends therefore, that this was "an obvious attempt to reinstate the charges which the court had just the day before dismissed" and that the promptness of the action itself "indicates the motives of the prosecution." Finally, defendant argues that the explanation given by the special prosecutor for the increased number of counts in the second indictment was inadequate to dispell the appearance of vindictiveness.

Obviously, promptness alone does not

demonstrate "vindictiveness." Furthermore, as we stated above, it was entirely proper for the prosecutor to seek a second and more expertly drafted indictment upon dismissal of the third count of the first indictment for pleading defects. See State v. Barnes, supra; State v. Moffitt, supra and State v. Williamson, supra. Moreover, as the Supreme Court stated in Goodwin, it is unrealistic to assume, as defendant would have us do, that the prosecutor's probable response to the defendant's routine filing of a pretrial motion challenging the sufficiency and form of an indictment was to seek to penalize and deter. As the Goodwin court observed:

> To presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible -- an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources.

457 U.S. at 382 n. 14, 102 S.Ct. at 2493, 73 L.Ed.2d at 86.

Additionally, it must be remembered that nothing else appearing, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." Goodwin, supra at 384, 102 S.Ct. at

2494, 73 L.Ed.2d at 87. The presumption applies only where the realistic likelihood of actual vindictiveness is clearly demonstrated by circumstances such as existed in Pearce and Blackledge. Here, to the contrary, defendant's pretrial motion "is an integral part of the adversary process in which our criminal justice system operates." United States v. Goodwin, supra. Under these circumstances, no realistic likelihood of prosecutorial vindictiveness has been demonstrated and a presumption of vindictiveness is wholly unwarranted. The defendant, therefore, has not shown a denial of due process in the bringing of his case to trial.

IV

Next, defendant contends that the trial court erred by denying defendant's motions to dismiss Counts I and IV made at the close of the State's evidence and at the close of all the evidence. Inasmuch as the defendant elected to offer evidence he is deemed to have waived his motion to dismiss Counts I and IV at the close of the State's evidence and may only challenge denial of the motion to dismiss at the close of all the evidence. State v. Leonard, 300 N.C. 223,

266 S.E.2d 631, cert. denied, 449 U.S. 960, 101 S.Ct. 372, 66 L.Ed.2d 227 (1980).

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. (Citation omitted). In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case -- they are for the jury to resolve. Id. The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. Id. The defendant's evidence, unless favorable to the State, is not to be taken into consideration. (Citations omitted). However, when not in conflict with the state's evidence, it may be used to explain or clarify the evidence offered by the State. Id. In ruling on the motion, evidence favorable to the State is to be considered as a whole in determining its sufficiency.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E. 2d 649, 652-653 (1982).

Count I

Count I of the superseding indictment charged, in substance, that the defendant, a licensed attorney, had stood bail bond for a person not a member of his immediate family,

in violation of G.S. 15A-541. Defendant admits that the evidence proved (1) that the defendant was on the date in question an attorney licensed to practice law in North Carolina, (2) that the defendant became a surety on a bail bond for Paula Ann Gately; and (3) that Paula Ann Gately was not a member of the defendant's immediate family. However, defendant argues that in addition to these three elements, the State must show (4) that the defendant knew there was a law prohibiting him from becoming a surety and (5) that the defendant intended to break the law.

It is defendant's contention that the State failed to prove that "defendant understood that the law in question was written to prevent him from signing bonds for anyone not a member of his immediate family" because Magistrate Ray testified on direct examination that he told defendant that an attorney could not sign bonds for "defendants" and on cross-examination that an attorney couldn't go bond for a "client." Further, that the evidence as a whole showed that at the time defendant signed the bond, "he mistakenly but in good faith believed that the statute allowed him to act as he was doing." We find

defendant's argument to be without merit.

With respect to defendant's fourth proposed element, ignorance of the law, if it were to be considered at all, would theoretically be a defense and not an element of the crime. Thus, the State did not have to prove that defendant was aware of the law to make its case. In any event, it is axiomatic that "ignorance or mistake of law will not excuse an act in violation of the criminal laws." 21 Am. Jr. 2d, Criminal Law §142, p. 278 (1981). See also 22 C.J.S., Criminal Law §48 (1961). Therefore, defendant's claim is legally without basis (as well as being utterly preposterous) because ignorance of the law is not a valid defense.

Factually, defendant fares no better because the magistrate twice informed the defendant and put the defendant on notice that there was at least a legal "problem" with an attorney signing the bail bond. Any purported discrepancies in Magistrate Ray's testimony regarding the prohibition's application to "clients" or "defendants" are (1) not properly considered in testing the sufficiency of the State's evidence, State v. Earnhardt, supra and (2) not relevant under G.S. 15A-541 whose prohibition applies to

non-family members. Moreover, defendant refused the Magistrate's offer to read the statute, stating that he was "aware" of it. It defies belief that the defendant would first willfully attempt to remain in ignorance of the law and then invoke this alleged ignorance in his defense. Thus, there is absolutely no merit in defendant's claim regarding "ignorance of the law."

Defendant's fifth proposed element, "intent to break the law," would appear to be, in part, a rephrasing of his fourth element regarding ignorance of the law, and in that respect, his contention is without merit. As to a mental state requirement itself, G.S. 15A-541 provides simply that "No. . .attorney. . .may in any case become surety on a bail bond for any person other than a member of his immediate family." As we noted earlier, there are no reported cases involving violations of G.S. 15A-541.

Although the statute itself does not state that the act must be done "intentionally" or "willfully," the indictment under which defendant was tried did contain such language. In addition, the jury was instructed as to the first count as follows:

Fourth, that at the time the de-

> fendant became a surety for Paula Ann Gately, if you find that he did so, that he did while knowing that there existed a law prohibiting his doing so. . .
>
> . . .and that the defendant did so knowingly and intentionally. . .

We conclude that the mental state required under G.S. 15A-541 is nothing more than the general intent to do the proscribed act; that is, for the attorney to intend or knowingly to become surety on a bail bond for any person other than a member of the attorney's immediate family. The language in the jury instruction regarding "knowledge that there existed a law prohibiting his doing so" must be considered mere surplusage.

The rationale behind the prohibition of a statute such as G.S. 15A-541 was well stated in an early case from South Dakota.

> Attorneys and counselors at law are officers of the court, and the object of the statute evidentally was to disqualify them from becoming sureties, not only in suits in which they might be retained as attorneys or as counsel, but in all cases pending in the courts; and thereby relieve them, not only from the importunities of their own clients to become sureties in suits in which they were attorneys, but from the solicitation of other at-

> torneys or persons whom they might feel a delicacy in refusing. As officers of the court, it was deemed proper to protect them from becoming quasi principals in any litigation before the courts in which they were not directly interested as parties.

Towle v. Bradley, 2 S.D. 472, 50 N.W. 1057, 1058 (1892).

In the case under discussion, there was ample evidence to intent to overcome defendant's motion to dismiss. There is no question that defendant knowingly and of his own free will signed the bail bond for Paula Ann Gately, to whom he was not related. In addition to testifying that he informed Rogers that the General Statutes prohibited attorneys from signing bail bonds for defendants and that Rogers nevertheless stated his intention to proceed, Magistrate Ray testified as follows:

> A. Well, the, the policy that I have at the Magistrate's Office is that once you inform an attorney what the statute is and he wants to put the bond in his name, I do that. The reason for it --
>
> Q. Okay --
>
> COURT: Let him finish his answer.
>
> A. -- Is so there won't be any argument in the courtroom. I don't

> have a law degree. I don't argue with a lawyer. I inform him and let him be aware of the violation and if he insists on having it in his name, then I go ahead and do it, make a copy of it for my file. We had similar cases and that's why this is the policy that I use. (Emphasis added).

The defendant's conviction on Count I is clearly supported by the evidence presented.

Count IV

The evidence, taken in the light most favorable to the State, including all of the evidence admitted, whether competent or incompetent, and so much of the defendant's evidence that clarifies the State's evidence, State v. Earnhardt, supra, is also sufficient to support the defendant's conviction on Count IV, attempting to interfere with a State's witness. First, defendant indicated his belief to both Officer Mizelle and Assistant District Attorney Dombalis that the case would have to be dismissed if the witness (McMillan) did not arrive. When McMillan did arrive, the defendant muttered "shit" and immediately summoned his client, McMillan and Officer Mizelle into the conference room. These three parties, McMillan, Gately and Mizelle, all testified to the effect that Rogers, Gately and McMillan reached an "agree-

ment" that Ms. Gately would pay for all of the damages incurred on the night of the accident if McMillan would agree not to press charges. Further, that since McMillan would no longer be needed, he could leave the courthouse. McMillan also testified that defendant "said he had a good chance of getting it (the DUI case) throwed out" because the police had never seen Ms. Gately drive while she was under the influence of alcohol.

The Assistant District Attorney testified that after McMillan returned to the courtroom, she asked him what had happened:

> . . .and he said that Mr. Rogers, the defendant in this case, Ms. Gately, Mr. McMillan and himself had worked out some kind of an agreement where the damages would be dismissed, or that Mr. McMillan's damages would be paid for and he wouldn't testify and all the charges would be dropped.

Detective Mundy testified from his present recollection that when he interviewed the defendant:

> In the conversation he admitted to me that in the conference room that he offered to pay Bobby McMillan's hospital bill, any damages to his vehicle if he would drop the charges.

Further, that McMillan, upon interview, told Mundy the following:

> He stated to me that Rogers told him that he would pay for his damages to his vehicle. Also, he would pay for the hospital bill if he would agree not to press charges.

Finally, defendant's own testimony establishes his attempt to reach an agreement with McMillan concerning Gately's cases and his only excuse for dismissing the State's witness on his own accord was "bad judgment" on his part.

Defendant was convicted only of attempting to interfere with a witness in violation of G.S. 14-226. An attempt is an overt act in partial execution of a criminal design which falls short of actual commission but which goes beyond mere preparation to commit. State v. Price, 280 N.C. 154, 184 S.E. 2d 866 (1971). In the present case, the witness had second thoughts and returned to the courtroom. The defendant's actions and statements considered as a whole, however, constituted overt acts designed to induce the State's witness to leave so that defendant could obtain a dismissal of both the DUI and hit and run charges against his client, Paula Ann Gately. It is clear that the defendant had no authority to either dismiss

the State's witness or to negotiate a dismissal for the criminal charges pending against Gately. The District Attorney, who is a constitutional officer, N. C. Const. Art. IV, §18 (Cum. Supp. 1983), is the only person authorized to dismiss a criminal charge in this context. State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959). It is abundantly clear from the evidence presented that defendant's efforts on behalf of Ms. Gately went far beyond representing his client "zealously within the bounds of the law," see Code of Professional Responsibility, Canon 7, and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a named case. Therefore, the issue was properly submitted to the jury and defendant's conviction on Count IV must be upheld.

V

Defendant's final arguments concern the terms of the sentence he received for his criminal convictions and the court's simultaneous entry of a civil order imposing the identical terms of discipline under the court's inherent authority to discipline attorneys.

The defendant received the maximum sentence of six months imprisonment for violat-

ing G.S. 15A-541 and the maximum sentence of two years imprisonment for violating G.S. 14-226. No fines were imposed, both sentences were suspended and defendant placed on unsupervised probation for five years. The court imposed seven conditions of probation; defendant makes no objection to the first five conditions, but contends that conditions six and seven are improper and impermissible. We disagree.

The two contested probationary conditions are as follows:

> (6) The defendant, this date, is to surrender his North Carolina Law License and Identifying Card to the North Carolina State Bar for eighteen (18) months. This eighteen (18) months revocation and suspension of license may be reduced to as little as six (6) months if the defendant satisfies the State Bar that he has (a) moral qualifications, competency and learning in the law within the range of competency demanding of attorneys by law in Civil and Criminal cases, (See State v. Vickers, 306 N.C. 90, 1982). (b) Satisfy the North Carolina State Bar that his physical and mental condition is such that it does not interfere with his handling of cases and advising clients.
>
> (7) The defendant is not to engage in the practice of law or hold himself out as an attorney during the

period of revocation and suspension. These two conditions are permitted by G.S. 15A-1343(b)(17), which provides:

> (b) Appropriate Conditions. - When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:
>
> * * * *
>
> (17) Satisfy any other conditions reasonably related to his rehabilitation.

Although defendant contends that the revocation and suspension of his law license is not reasonably related to his rehabilitation, the probationary judgment itself indicates otherwise. The terms show that defendant could reduce his license suspension to as little as six months if he satisfies the State Bar as to his competency to resume the practice of law with regard to his moral qualifications, competency, legal knowledge and physical and mental condition.

The record of defendant's sentencing hearing shows the trial court's evident and justifiable concern that the defendant was lacking in the areas of legal learning, knowledge, competency and the moral qualifica-

tions demanded of attorneys in civil and criminal cases and that the public needed to be protected pending his rehabilitation. The record in this case amply supports the court's concern. The defendant was convicted of attempting to interfere with a witness in violation of G.S. 14-226, the gist of which has been termed the "obstruction of justice." State v. Neely, supra. He was also convicted of violating G.S. 15A-541, which is directed towards officers of the court. Defendant's defense of ignorance of the law, "bad judgment" and his actions in advising Paula Ann Gately to prosecute a legal action against Bobby McMillan when there was no legal or factual basis for the action demonstrate a marked lack of legal competence, if not moral disqualification for the practice of law. The other terms of probation are equally well supported by the testimony at defendant's trial. Thus, the suspension of defendant's law license is reasonably related to his conduct and his rehabilitation.

> It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the extent of the punishment imposed is

> within the discretion of the trial court and is subject to review only in cases of gross abuse.

State v. Goode, 16 N.C.App. 188, 189, 191 S.E.2d 241, 241-242 (1972). The defendant has shown no abuse of discretion, gross or otherwise, in the trial court's sentence. Inasmuch as we find no abuse of discretion in the probationary judgment imposed for defendant's criminal violations, we deem it unnecessary to address the issues directed toward the identical terms of the court's civil disciplinary order.

VI

Defendant presents a number of other questions for review concerning, inter alia, the trial court's evidentiary rulings and the destruction of the original tape recording of his interview by Detective Mundy. We have carefully reviewed these and other issues defendant has attempted to raise in the context of his various arguments and find them to be without merit.

We conclude, therefore, that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge VAUGHN and Judgd WEBB concur in the result.

APPENDIX C

No. 451P84 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA)
)
vs.)
)
DAVID H. ROGERS)

****

NOTICE OF APPEAL

****

NOTICE is hereby given by DAVID H. ROGERS, Appellant, that he hereby appeals to the United States Supreme Court from the Order of the North Carolina Supreme Court, J. Frye, dated August 9, 1984, denying Appellant's (1) Petition For Writ of Certiorari to the North Carolina Court of Appeals (No. 8310SC825) to Review the Judgment of that Court affirming Appellant's convictions below (Wake County case No. 82-CRS-63259); and (2) Petition For A Temporary Stay Pending Final Appellate Review.

THIS NOTICE is given and appeal taken pursuant to the authority of the provisions of Rule 10 of the Rules of the United States Supreme Court; the provisions of 28 U.S.C. 1257(2); and the provisions of New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928) and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975).

This the 4th day of October, 1984.

s/ Wayne Eads
Attorney for Appellant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true copy of the foregoing Notice of Appeal was served this date upon counsel for the opposing party, the State of North Carolina, by placing same in the mail at the United States Post Office, postage prepaid, addressed to:

Mr. Charles H. Hobgood, Esq.
Associate Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27611.

This the 4th day of October, 1984.

s/ Wayne Eads
Attorney for Appellant

Office-Supreme Court, U.S.
FILED
DEC 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-733 (2)

In The
Supreme Court of the United States
October Term, 1984

DAVID H. ROGERS,

Appellant,

vs.

STATE OF NORTH CAROLINA,

Appellee.

On Appeal From The Supreme Court of North Carolina

MOTION TO DISMISS APPEAL

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QUESTIONS PRESENTED

I. DID THE STATE FAIL TO COMPLY WITH THE DISCOVERY AND DISCLOSURE REQUIREMENTS OF NORTH CAROLINA GENERAL STATUTE 15-A-901, *ET SEQ.*, AND VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

II. DID THE PROSECUTION OF THE APPELLANT ON A SUPERCEDING INDICTMENT THAT CONTAINED AN ADDITIONAL COUNT RAISE A PRESUMPTION OF VINDICTIVE PROSECUTION?

III. WAS THE APPELLANT SUBJECTED TO IMPERMISSIBLE SELECTIVE PROSECUTION?

IV. DID THE STATE FAIL TO FOLLOW THE NORTH CAROLINA PROCEDURAL REQUIREMENTS FOR THE OBTAINING OF A PRESENTMENT AND INDICTMENT?

V. IS THE NORTH CAROLINA PRESENTMENT PROCEDURE UNCONSTITUTIONAL?

VI. DID THE SUSPENSION OF THE APPELLANT'S LAW LICENSE IMPOSED BY THE TRIAL JUDGE IN A CIVIL ORDER CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND VIOLATE DUE PROCESS?

PARTIES

In the North Carolina Supreme Court and the North Carolina Court of Appeals, the parties were: David H. Rogers, Defendant-Appellant, and the State of North Carolina, Appellee.

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No. 84-733

In The
Supreme Court of the United States
October Term, 1984

DAVID H. ROGERS,

Appellant,

vs.

STATE OF NORTH CAROLINA,

Appellee.

On Appeal From The
Supreme Court of North Carolina

MOTION TO DISMISS APPEAL

Pursuant to the authority of Rule 16 and in the manner provided by Rules 33 and 42 of the Rules of the Supreme Court, the State of North Carolina moves to dismiss the appeal of David H. Rogers and further requests that the appellant's alternative petition for Writ of Certiorari be denied on the basis of the facts and authorities hereinafter set forth for the court's consideration.

OPINION BELOW

The opinion of the North Carolina Court of Appeals in this case is reported in *State v. Rogers,* 68 N.C. App. 358, 315 S.E.2d 492 (1984), *cert. denied,* — N.C. —, 319 S.E.2d 284 (1984).

JURISDICTION

The jurisdiction of this court has been invoked pursuant to 28 U.S.C. § 1257(2), and in the alternative pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

The appellant, David H. Rogers, was an attorney licensed to practice law in North Carolina. (T.21). Between 2:00 and 2:30 a.m. on July 7, 1982, he was in the Wake County Magistrate's Office. (T.24). The magistrate on duty was Jerry Ray. (T.23). Mr. Ray had seen Attorney Rogers at the back of the courthouse late at night on other occasions. (T.390).

Earlier that same night a young lady named Paula Ann Gately had gone to Darryl's Restaurant on Glenwood Avenue in Raleigh. (T.1G). She drank alcoholic beverages. (T.2G). She became very intoxicated. (T.45). She remembered leaving the restaurant and pulling out into Glenwood Avenue, but her memory became vague at that point. (T.26).

At the same time that Gately pulled out into Glenwood Avenue, a man named Bobby McMillian was driving on Glenwood Avenue near Darryl's Restaurant. Gately

drove through a flashing red light and pulled out in front of McMillian. The lights on her car were off. (T97-98). McMillian put on brakes, skidded, and the two cars hit. (T.98; 6 MA). Gately drove away. McMillian drove after her. Gately tried to drive over a concrete median. (T. 99). Her car cut off. McMillian ran up and asked her if she knew that she had been in an accident. Gately said that all she wanted to do was to go home. She started her car and drove off. (T.100).

McMillian went to the Fast Fare and telephoned the police. (T.102). Officer Mizellee of the Raleigh Police Department was called to investigate the accident. He arrived at Crabtree Valley at 12:57 a.m. and talked with McMillian about the accident. (T.41). McMillian described the accident, but he did not know the names of the streets that intersected with Glenwood Avenue. (T.93).

Meanwhile, Gately and her parked car were found at York Elementary School. When Officer Mizelle arrived, Gately was out of her car and her car's motor was not running. He did not see her driving. (T.43-44).

Officer Mizelle placed Gately under arrest and took her to the magistrate's office. (T.45). When he brought Gately in, Magistrate Ray and Attorney Rogers were in the magistrate's office. (T.24). Magistrate Ray charged Gately with driving under the influence and with hit and run and placed her under a $100.00 secured bond. (T.25).

Attorney Rogers, who had been listening, told Magistrate Ray that he wanted to post Gately's bond. Magistrate Ray informed him that "the statute, 85C-22 states that attorneys are not allowed to sign bail bonds for defendants." Attorney Fogers said he was going to post

her bond, and he left to get the bond money. (T.26). When he returned, Magistrate Ray again informed him of the statute. Magistrate Ray had taken out the North Carolina General Statute book in order to show the statute to Attorney Rogers. (T.27). Attorney Rogers said that he was aware of the statute. (T.391). He did not read the statute then or later. (T.392). He paid the $100.00 and signed the bond as surety. (T.27-30). He was not related to Gately. (T.5G).

Attorney Rogers and Gately left together. (T.30). He drove her home. In his car he gave Gately his business card. She gave him her court papers. (T.7G). At that time she considered him to be her attorney, and he considered himself to be her attorney. (T.9G; 10-11GA; 2MU).

The next day Gately telephoned McMillian. (T.103). She told him that she would pay for his damages and send him a check for $150.00 and pay the hospital bill. He told her that her leaving the accident was dangerous because he carried a gun. She was surprised to hear this. (T. 104). She did not remember him pointing a gun at her. (T.2-3G). He had had a gun with him when he approached her the night of the accident, but he had left it in the holster and had not pointed it at her. (T.101).

Gately sent McMillian a check. (T.9G). One or two days later she telephoned her attorney, Rogers, to let him know what she had done. Attorney Rogers advised her to stop payment. (T.10G; 248). As a result of his advice, she stopped payment. (T.11GA). McMillian received the check but could not cash it because payment had been stopped. (T.104).

Before Gately's cases came on for trial, Attorney Rogers went to the Wake County Clerk's Office and talked with the Clerk's Administrative Assistant, Barbara Mobley, about getting off Gately's bond. Mobley asked Attorney Rogers, "you're not going to represent her, are you? And he said, no, no. I just I did it for a friend . . . . . he was not going to represent her." (T.124-127). In response to their conversation, Mobley received a letter from Attorney Rogers dated August 17, 1982, in which he referred to Gately as "a friend." (T.126).

On August 19, 1982 Gately's cases were scheduled for trial in Wake County District Court. She went to court with Attorney Rogers because he was her attorney. (T. 14G). Officer Mizelle was present. (T.51). The judge presiding was Narley Cashwell. (T.160). The Assistant District Attorney was Mary Dombalis. She was the only District Attorney in the courtroom. (T.135). McMillian was subpoenaed to appear as a witness for the State, but he was late in arriving. (T. 106; 1M; 8Z).

When Officer Mizelle arrived in court, he saw Attorney Rogers in the courtroom. (T.54). Attorney Rogers approached Officer Mizelle and said that he wanted to talk about Gately's cases. He asked Officer Mizelle if Mizelle had seen McMillian in the courtroom. Officer Mizelle said that he had not seen McMillian. Attorney Rogers said, ". . . if he doesn't show up, we'll have the case dismissed . . ." (T.55).

At 9:00 a.m. the Assistant District Attorney called the calendar. (T.135). When she called Gately's cases, Attorney Rogers stood up and said that he represented Gately and that the plea was not guilty. (T.136). He did not ask

that Gately's cases be left open. (T.143). A few minutes later the Assistant District Attorney asked Attorney Rogers what he wanted to do with Gately's cases. Attorney Rogers "indicated to me at the time that my witness was not there and if the witness did not show up I'd have to dismiss the case. (T.137).

The Assistant District Attorney called out McMillian's name. No one answered. She took the case file to the witness coordinator, Charles Caldwell, for Caldwell to locate the witness. (T.137-138). McMillian came in around 10:00 a.m. The witness coordinator told him to go to the courtroom. (T.131). The witness coordinator sent a slip to the Assistant District Attorney telling her that the witness had arrived. She called out McMillian's name. He answered. (T.138). When he answered, Attorney Rogers muttered "shit" and motioned for Gately to meet him in the attorneys' conference room. (T.64).

Judge Cashwell noticed Attorney Rogers moving in and out of the conference room, which was becoming distracting. (T.162). Attorney Rogers approached Officer Mizelle several times to talk about Gately's cases. (T.62).

Attorney Rogers asked Officer Mizelle to come into the attorneys' conference room. Present at this conference were Attorney Rogers, McMillian, Gately, and Officer Mizelle, but not the Assistant District Attorney. (T. 66). Attorney Rogers discussed the accident with McMillian. He offered to have Gately pay McMillian's damages. He told McMillian that they could bring a charge against him for assault by pointing a gun. (T.108). He said that McMillian was the only one who had seen Gately driving and that he would have a good chance of getting

Gately's cases thrown out if McMillian was not a witness. (T.109). Attorney Rogers expected a dismissal of both the hit and run and the driving under the influence charges. (T.280). He and McMillian agreed that if McMillian did not press charges and did not appear as a witness, his damages would be paid. (T.67; 109; 14G; 3-6MU). Attorney Rogers told McMillian to hit the door, to go. (T.110). On the way out, Attorney Rogers told Officer Mizelle that McMillian was just a dumb nigger looking for a way to get money. (T.69).

McMillian left, went downstairs, had second thoughts, and went to see the witness coordinator. (T.111). He told the witness coordinator that the attorney had told him to leave. (T.133). The witness coordinator told McMillian to go back in the courtroom and wait for the case to be called. (T.112; 134). McMillian went back into the courtroom and satdown. (T.113). The witness coordinator told the Assistant District Attorney what McMillian had told him. (T.134).

The Assistant District Attorney was informed that there had been a conference in which it was agreed that if McMillian's damages were paid, he would not testify and the charges would be dropped. (T.139). She was shocked because she had not had an opportunity to speak with the witness, because she had not been present at the conference, and because the defense attorney had dismissed the State's witness. (T.140; 152). She asked Judge Cashwell to continue Gately's cases. (T.141). This was about 12:30 or 1:00 p.m. (T.212). Attorney Rogers had not spoken to her about Gately's cases since calendar call, although he had had the opportunity to do so. (T.142; 159).

When the Assistant District Attorney asked for a continuance, Attorney Rogers "stood up and very beligerently said, we're ready for trial. We have been here all morning and we're ready for this case to be tried." (T. 155-156; 162-163). Judge Cashwell asked Attorney Rogers if he excused the State's witness. Attorney Rogers did not reply but began to discuss the case. Judge Cashwell again asked him if he excused the State's witness. Again he began to talk about the merits of the case. Judge Cashwell stopped him and again asked him if he excused the State's witness. (T.164). He then admitted that he had told the witness to leave. (T.156, 171).

That day or the next day Attorney Rogers contacted Gately and advised her to take out a warrant against McMillian for assault by pointing a gun. (T.15G). Gately had told him that she did not remember the incident. (T. 3G). He then went with her to the magistrate's office. A warrant was taken out against McMillian. (T.16G). Attorney Rogers listed his own name as a witness on the warrant. (State's Exhibit 9). McMillian was charged, taken to the police station, fingerprinted, and photographed. (T.114).

A week later Gately went back to the magistrate's office and tried to drop the charge against McMillian because she did not think it was right, because she thought it was vindictive, and because she did not actually remember the event occurring and did not want to get involved in a case about which she was ignorant. (T.16, 18-20G).

Attorney Rogers was indicted on October 25, 1982, after the Wake County Grand Jury returned a presentment. The three count indictment charged (1) becoming

a surety on a bail bond in violation of G.S. 15-A-541, (2) improperly soliciting legal business, and (3) interfering with and intimidating a witness. On February 14, 1983 the appellant's pre-trial Motion To Dismiss count three for failure to state an offense was granted.

On February 15, 1983 the State obtained a superseding indictment and voluntarily dismissed the first indictment. In the superseding indictment, counts one and two were re-worded but remained essentially the same, and count three was broken down into two counts; new count three charging intimidating a witness and new count four charging attempting to interfere with a witness.

The appellant was tried with his consent at the February 15, 1983 Criminal Session of Wake County Superior Court. The jury returned a verdict of guilty as to count one, becoming a surety on a bail bond in violation of G.S. 15A-541, and as to count four, attempting to interfere with a witness, and a verdict of not guilty as to count two, improperly soliciting legal business, and as to count three, intimidating a witness. The appellant was given a suspended sentence on each count to run consecutively and was placed on unsupervised probation. As a condition of probation, the appellant was required to surrender his law license and not practice law for eighteen months, which period could be reduced to six months if he satisfies the North Carolina State Bar with regard to his moral qualifications and competency. In addition, pursuant to the court's summary jurisdiction to discipline attorneys, the trial judge entered a Civil Order imposing the identical discipline upon the appellant as that imposed in the probationary judgment.

REASONS WHY THE APPEAL SHOULD BE DISMISSED

I. The State Did Not Fail To Comply With The Discovery And Disclosure Requirements Of General Statute 15-A-901, Et Seq., Or Violate The Due Process Clause Of The Fourteenth Amendment.

The appellant contends that the inability of the State to produce an original tape recording violated due process. As noted by the North Carolina Court of Appeals, this argument is without merit. *State v. Rogers,* 68 N.C. App. at 391, 315 S.E.2d at 514. The pertinent facts are as follows:

On September 20, 1982 Detective A. C. Munday interviewed the appellant in the appellant's law office. (T.1 MU). Detective Munday made a tape recording of this interview. He took the tape to his office, and it was transcribed verbatim. (T.26, Motions Hearings).

There is no evidence that the appellant, who was an attorney, requested that the original tape recording of his interview be preserved.

After the tape recording was transcribed, Detective Munday used the tape, which was in a small dictating unit, to take statements from other people in this and other cases. The recording of his interview with the appellant was dictated over and thereby erased. (T.26, Motions Hearing).

On November 4, 1982 the appellant filed a Request for Voluntary Discovery. (R.17). On November 12, 1982 the

State voluntarily complied with discovery and provided the appellant with a copy of the transcript of the appellant's interview. (R.19). The appellant eventually withdrew his motion to compel discovery because the State had complied with his request. (T3, Motions Hearing).

On December 3, 1982, the appellant filed a motion to inspect and copy the original tape recording of all interviews made by Detective Munday. (R.27). On December 30, 1982 the State informed the appellant that the recordings had been made on the same small dictating unit, which is used repeatedly by the Raleigh Police Department, and that the recordings had been dictated over or erased and were no longer available. (R.22).

At pre-trial hearings held on January 5, 1983 Judge Britt denied the appellant's motion to produce the tape recordings. (R.28). The appellant did not request an evidentiary hearing. (T.22-32, Motions Hearing).

At the trial the State did not introduce during its case in chief evidence of the appellant's statement or of any tape recordings or transcripts. After the State rested, the appellant took the stand and testified. During cross examination, the appellant, in answers that were not responsive to the questions asked, voluntarily informed the jury that a tape recording and a transcript had been made of his statement. (T.357). The State did not question the appellant about the transcript until after the appellant had himself put the issue to the jury.

At the close of the appellant's evidence, the State called Detective Munday as a rebuttal witness. Detective Munday testified from his present recollection as to the statements made by the appellant to him. (T.2 MU). The

State did not introduce evidence on direct examination of Detective Munday regarding the transcript or recording.

The appellant brought out on cross examination that Detective Munday had recorded his interview of the appellant. (T.6 MU). The appellant vigorously cross examined Detective Munday and attempted to show that the transcript of appellant's statement differed from Detective Munday's present recollection of the appellant's statement. A comparison of the two, however, reveal no serious discrepancies. (T2-10 MU; R.38). Detective Munday testified that the transcript was an accurate rendition of the appellant's words. (T10-11 MU).

The appellant's contention that the inability of the State to produce the original tape recording violated due process is without merit for several reasons. First, Detective Munday acted in good faith in erasing the tape inasmuch as the tape was preserved by way of an accurate transcript. Second, the erased tape was not important to the defense. The transcript was not introduced into evidence by the State. The appellant did not object to or move to suppress Detective Munday's testimony regarding his present recollection of the statements the appellant made to him. Detective Munday was thoroughly cross examined. The appellant made generalized accusations that the tape contained inaccuracies but not once did he point to a specific inaccuracy. His claims of inaccuracies are unsupported. In fact, the appellant used the loss of the tape to his advantage. In an answer not responsive to the question asked, the appellant informed the jury that he believed that a playing of the tape would reveal errors in the transcript. He volunteered this to the jury at a time when he well knew that the tape had been erased

and that the State was helpless to rebut his allegations. Third, the appellant's guilt was established by the testimony of other witnesses and by the appellant's own testimony.

Because the detective acted in good faith and because the original tape was not important to the defense, the appellant has neither shown a violation of due process or prejudice. *State v. Anderson,* 57 N.C. App. 602, 292 S.E.2d 163, *cert. denied,* 306 N.C. 559 (1982); *United States v. Augenblick,* 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed. 2d 537 (1969); *United States v. Bryant,* 448 F.2d 1182, D.C. Cir. (1971); *United States v. Miranne,* 688 F.2d 980 (5th Cir. 1982); *State v. Peters,* 390 Or.App. 109, 591 P.2d 761 (1979); *United States v. Kuykendall,* 633 F.2d 118 (8th Cir. 1980).

II. The Prosecution Of The Appellant On A Superseding Indictment That Contained An Additional Count Did Not Raise A Presumption Of Vindictive Prosecution.

The North Carolina Court of Appeals correctly held that the appellant was not entitled to a presumption of vindictive prosecution merely because the State obtained a new and more perfect indictment after part of the original indictment had been quashed as a result of the appellant's Motion to Dismiss the original indictment. *State v. Rogers,* 68 N.C. App. at 377-383, 315 S.E.2d 506-510.

A case on point is *United States v. Banks,* 682 F.2d 841 (9th Cir. 1982). There the defendant was indicted in a five count indictment. The indictment was dismissed. The prosecutor obtained a new indictment re-charging the defendant but adding one new count. The 9th Circuit

Court of Appeals, relying on *United States v. Goodwin,* 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), held that a presumption of prosecutorial vindictiveness does not arise in this type of pre-trial setting.

Other cases holding that adding counts to an indictment does not raise a presumption of vindictiveness include *United States v. Brooklier,* 685 F.2d 1208 (9th Cir. 1982) and *United States v. Hinton,* 307 F.2d 672 (2nd Cir. 1983).

Based on the facts and the above authority, this argument is without merit.

III. The Appellant Was Not Subjected To Impermissible Selective Prosecution.

The appellant argues that he was subjected to impermissible selective prosecution. After a thorough discussion of this question, the North Carolina Court of Appeals held that, even considering the appellant's proffer of proof as evidence, the appellant failed to make even a prima facie showing that he has been singled out for prosecution or that his prosecution resulted from impermissible considerations. *State v. Rogers,* 68 N.C. App. at 366-377, 315 S.E.2d at 500-506.

The opinion of the North Carolina Court of Appeals so thoroughly discusses and disposes of this argument that further discussion would merely be repetitious; therefore, the State relies upon the opinion of the North Carolina Court of Appeals. The State would briefly note that the facts show that the appellant was not singled out for prosecution and that he was not prosecuted as the result of impermissible considerations. Further, the prosecu-

tion of his case was referred to and handled by the North Carolina Attorney General's Office. Thus any possible impermissible considerations on the part of the Wake County District Attorney's office were insulated by an independent review by a separate state department. *United States v. Erne,* 576 F.2d 212 (9th Cir. 1978); *United States v. Greene,* 698 F.2d 1364 (9th Cir. 1983); and *United States v. Gervasi,* 562 F.Supp. 632 (1983).

United States v. Wayte, 610 F.2d 1385 (9th Cir. 1983) cited by the appellant, deals with draft resisters and is so factually distinguishable that it is irrelevant to the present case.

This argument is without merit.

IV. The State Did Not Fail To Follow The North Carolina Procedural Requirements For The Obtaining Of A Presentment And Indictment.

This argument as well as Argument V were considered by the North Carolina Court of Appeals, which held that they are "wholly without merit." *State v. Rogers,* 68 N.C. App. at 370, n.3, 315 S.E.2d at 502, n.3. Under North Carolina law, a prosecutor has the option of initiating a misdemeanor charge in Superior Court by requesting that the Grand Jury consider a presentment, and if the Grand Jury finds probable cause, then the prosecutor may proceed with an indictment. As noted by the North Carolina Court of Appeals, the correct procedure was followed in the present case. The appellant has not shown that this procedure violates due process. He was prosecuted on an indictment returned by a Grand Jury, was afforded a jury trial, and was otherwise afforded full due process.

Further:

> "The guarantee of due process, viewed in its procedural aspect, requires no particular form of procedure. The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State courts or regulate practice therein."

16A Am. Jur. 2d *Constitutional Law*, § 814.

The appellant has not shown that the North Carolina presentment and indictment procedure was not followed or that the procedure violates due process.

V. The North Carolina Presentment Procedure Is Not Unconstitutional.

The appellant argues that the North Carolina presentment and indictment procedure is unconstitutionally vague. As noted in Argument IV, the North Carolina presentment and indictment procedure was correctly followed by the State in this case. The appellant has failed to show how this procedure is vague or how any alleged vaguenesses injured him. He was tried on an indictment returned by a Grand Jury, was afforded a jury trial, and was given full due process. This argument is without merit.

VI. The Suspension Of The Appellant's Law License Imposed By The Trial Court In A Civil Order Did Not Constitute Cruel And Unusual Punishment Or Violate Due Process.

After the appellant's conviction of two misdemeanors, the trial judge gave the appellant a suspended sentence with probation. The conditions of probation included the suspension of the appellant's law license for eighteen months. After imposing the criminal sentence,

the trial judge then proceeded to impose a civil disciplinary order that imposed the identical discipline as that set forth in the criminal probationary judgment. The appellant argues that the trial judge violated his rights to due process in imposing the civil order.

This question is moot. As noted by the North Carolina Court of Appeals, "inasmuch as we find no abuse of discretion in the probationary judgment imposed for defendant's criminal violations, we deem it unnecessary to address the issues directed toward the identical terms of the court's civil disciplinary order." *State v. Rogers,* 68 N.C. App. at 390-391, 315 S.E.2d at 514.

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CONCLUSION

The appellant's appeal should be dismissed on the ground that, based on the facts of the present case, it does not present a substantial federal question. Further, for the foregoing reasons, the State of North Carolina submits that the appellant's alternative petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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